ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL DECISIONS

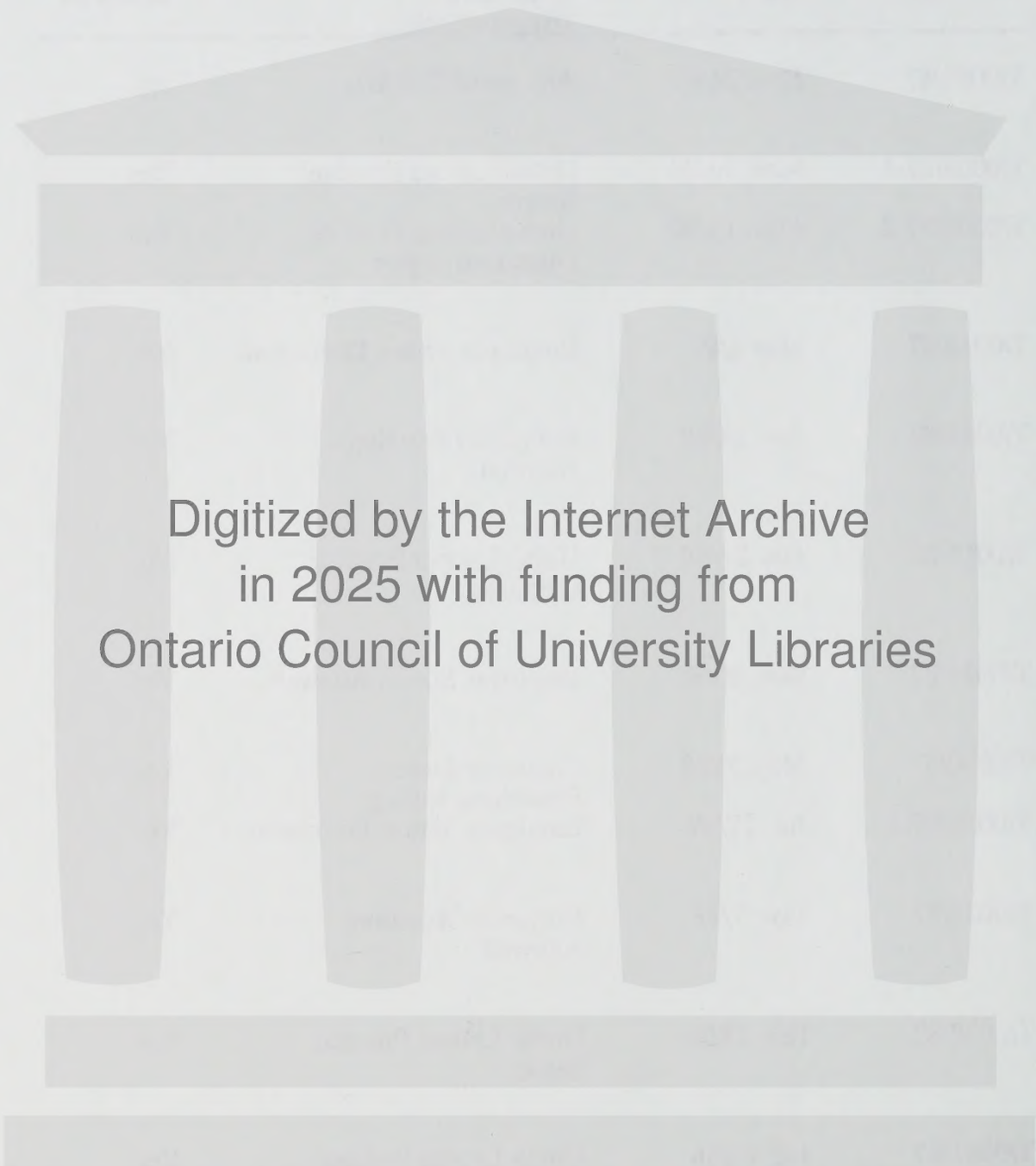
TRIBUNAL DECISIONS

1987 - 1988

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL DECISIONS

1987 - 1988

File No.	Date	Type and Disposition	Indexed
T/0001/87	Dec. 24/87	Adjourned Sine Die	No
T/0008/87-1	Mar. 30/89	Unfair Labour Practice; Interim	Yes
T/0008/87-2	Mar. 13/90	Unfair Labour Practice; Dismissed in part	Yes
T/0014/87	May 2/89	Employee Status; Dismissed	Yes
T/0016/87	Jan. 12/88	Religious Objection; Allowed	Yes
T/0017/87	Jan. 22/88	Unfair Labour Practice; Dismissed	No
T/0026/87	Dec. 20/89	Employee Status; Allowed	Yes
T/0030/87	May 20/88	Employee Status; Procedural Ruling	Yes
T/0030/87-2	Jul. 27/89	Employee Status; Dismissed	Yes
T/0033/87	Mar. 7/88	Religious Objection; Allowed	Yes
T/0038/87	Feb. 18/88	Unfair Labour Practice; Settled	No
T/0041/87	Jul. 12/88	Unfair Labour Practice; Preliminary	Yes
T/0041/87-2	Jun. 15/89	Withdrawn	No
T/0053/87	May 8/89	Employee Status; Dismissed	Yes



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File No.	Date	Type and Disposition	Indexed
T/0060/87	Dec. 2/88	Unfair Labour Practice; Dismissed	Yes
T/0005/88	Nov. 4/88	Unfair Labour Practice; Adjourned pending G.S.B. decision	Yes
T/0015/88	Apr. 29/93	Unfair Labour Practice; Allowed	Yes
T/0016/88	Jun. 23/89	Unfair Labour Practice; Dismissed	Yes
T/0018/88	Sept. 8/89	Duty of Fair Representation; Dismissed	Yes
T/0025/88	Feb. 21/89	Duty of Fair Representation; Dismissed	No
T/0026/88	Feb. 20/90	Unfair Labour Practice; Dismissed	Yes
T/0037/88	Jul. 21/89	Bargaining Authority, Allowed in part; Unfair Labour Practice, Dismissed	Yes
T/0047/88-1	Oct. 21/90	Unfair Labour Practice; Preliminary	Yes
T/0047/88-2	Feb. 26/93	Unfair Labour Practice; Dismissed	Yes
T/0049/88	Jul. 17/89	Religious Objection; Allowed	Yes
T/0052/88	Oct. 10/89	Certification; Allowed	No

Ontario Public Service Labour Relations Tribunal
Fonction Publique de l'Ontario Tribunal Administratif des Relations du Travail

180 Dundas Street West, Suite 2100, Toronto, Ontario M5G 1Z8 416/598-0688

T/0001/87

CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

R.S.O. 1980, c.108

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

B E T W E E N :

OPSEU (V. A. Ferraro)

Complainant

and

The Crown in Right of Ontario
(Ministry of Correctional Services)

Respondent

D E C I S I O N

Having regard to the agreement of the parties to adjourn this matter, the Tribunal hereby adjourns this matter sine die for a period not exceeding one year. If neither party requests that the matter be brought on for hearing within that time, it will be terminated at the expiration of one year from the date hereof.

DATED at Toronto, Ontario, this 24th day of December, 1987.

"Pamela C. Picher"

Pamela C. Picher, Chairman
For the Tribunal

T/0008/87-1

Ontario Public Service
Labour
Relations
Tribunal

Fonction Publique de l'Ontario
Tribunal Administratif
des Relations
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T/0008/87

IN THE MATTER OF AN COMPLAINT

Under

THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

Before

THE LABOUR RELATIONS TRIBUNAL

Between:

(James Glenny and Les Gondor)

Complainants

- and -

The Crown in Right of Ontario
(Ministry of Government Services)

- and -

OPSEU

Respondent

Before:

M. Mitchnick — Alternate Chairperson
K. McDonald — Member
J. McGivney — Member

For the Incumbent: James Glenny and Les Gondor

For the Respondents: Robert Little
Hicks Morley Hamilton
Stewart Storie
Barristers & Solicitors

Howard Law
Grievance Officer
Ontario Public Service
Employees Union

Hearing: December 9, 1988

DECISION

This matter came on for hearing before the Tribunal on December 9, 1988. At that time the complainants requested an adjournment in order to provide them with an opportunity to obtain legal counsel to represent them - such counsel to be paid for by the respondent Union and Ministry.

The Tribunal dealt with that request at the hearing, giving its reasons orally; however, as it will now not be possible to have the matter continue with the same panel of the Tribunal, we consider it appropriate to provide a summary of our comments as follows:

1) Given the complexity of the proceedings and the relatively late stage at which the complainants were in receipt of the respondent Union's clear position on providing legal representation, the Tribunal considered it appropriate to grant an adjournment, to provide the complainants the opportunity to consider retaining and to retain legal counsel if they so decide.

2) The Tribunal ruled that it was unable to make a determination prior to full litigation of the matter whether it could or should order that any legal counsel retained by the complainants be financed by the opposing parties to the proceedings, whether by way of "costs", or by way of "damages".

3) Given its ruling with regard to the complainants having the opportunity to seek legal counsel, the Tribunal made no ruling with respect to any of the motions being put forward by the respondents, including requests for particulars, and for the striking of portions of the amended complaint.

4) The Tribunal directed the complainants to notify counsel for the Union and for the Ministry at once should counsel be retained for themselves, providing identification of any such counsel.

5) The complainants' attention was directed to Rule 31 of the Tribunal's Rules of Practice (Regulation 233) concerning the obligation of parties to provide adequate particulars in advance of a hearing.

6) The Tribunal indicated that it would be appointing an Officer forthwith to meet with the parties and attempt to achieve a resolution of some or all of the matters before it.

DATED at Toronto, Ontario this 30th day of March, 1989.

M.G. Mitchnick - Alternate Chairperson

K.I. McDonald - Member

J.H. McGivney - Member

Ontario Public Service Labour Relations Tribunal
Fonction Publique de l'Ontario Tribunal Administratif des Relations du Travail

180 Dundas Street West, Suite 2100, Toronto, Ontario M5G 1Z8
416/598-0688

T/0008/87-2

Crown Employees Collective Bargaining Act
R.S.O. 1980, c. 108

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

T/0008/87

BETWEEN: Glenny & Gondor

Complainants

- and -

The Crown in Right of Ontario
(Ministry of Government Services)

Respondent

- and-

Ontario Public Service Employees Union

Respondent

Before:	J.H. Devlin	Vice Chairman
	M. Sullivan	Member
	C. Boettcher	Member
For the Complainants:	Harry Kopyto Legal Agent	
For the Respondent Ministry:	Robert W. Little Counsel Hicks Morley Hamilton Stewart Storie Barristers and Solicitors	
For the Respondent Union:	Howard Law Grievance officer Ontario Public Service Employees Union	
Hearing:	January 11, 1990	

The complaint in this matter was initially filed by the Union and alleged that the Respondent Ministry and certain members of management acted in a manner intended to interfere with the operation of Local 508 of the Ontario Public Service Employees Union. At the time the complaint was filed, Jim Glenny and Les Gondor were the President and Vice-President of Local 508, respectively. The Sections of the Crown Employees Collective Bargaining Act which were alleged to have been violated by the Ministry are as follows:

> 29.-(1) No person who is acting on behalf of the employer shall participate in or interfere with the selection, formation or administration of an employee organization or the representation of employees by such an organization, but nothing in this section shall be deemed to deprive the employer or any person acting on behalf of the employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.
>
> (2) The employer or any person acting on behalf of the employer shall not,
>
> (a) refuse to employ or to continue to employ or discriminate against any person with regard to employment or any term or condition of employment because the person is exercising any right under this Act or is or is not a member of an employee organization;
>
> (b) impose any condition on an appointment or in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of an employee organization or exercising any right under this Act.
>
> (c) seek by intimidation, by threat of dismissal or by any other kind of threat or by the imposition of a pecuniary or any other penalty or by any other means to compel an employee to become or refrain from becoming or to continue or cease to be a member of an

employee organization, or to refrain from exercising any other right under this Act; or

(d) refuse to employ or continue to employ or discriminate against a person with regard to employment only because the person refused to make a contribution or expenditure to or on behalf of any political party or to or on behalf of a candidate for public office,

but no person shall be deemed to have contravened this subsection by reason of any act or thing done or omitted in relation to a person employed in a managerial or confidential capacity.

(3) No person or employee organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of an employee organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

The conduct complained of was set out in the initial complaint in the following manner:

On or about February, 1987, the Respondents, did unilaterally announce that certain portions of the realty and other groups as set out above would be moved to a new location. The Complainant state(sic) and the fact is that such actions on the part of the Respondent will have little or no business efficacy but to decimate the local executive by having the majority of Local 508 Executive removed from the work place of Local 508. It is the Applicant's position that the Respondent is proceeding in the way it is solely for the purpose of removing the Local Executive from the Unit and preventing the Executive from properly functioning.

In the fall of 1988, the initial complaint was amended

such that the complaint is now being brought by Jim Glenny and Les Gondor and also involves a claim against the Ontario Public Service Employees Union. In the amended complaint, the following was added to the paragraph of the initial complaint set out above:

> That petitions dated September 22, 1988 and September 25, 1986 were introduced and circulated during working hours and on employers premises and with management concurrence. Additionally, there were numerous changes in the plans as produced with the exception of those changes which would maintain the integrity of the local. Please reference Jim Clancy's letter of September 24, 1988 addressed to Dennis Caplice, Deputy Minister, Minister of Government Services, and to Stewards and Officers respectively. Also Maria Wacyk's letter of June 24, 1988 and Wesley Spence's letter of July 19th and 25th, 1988.

The amended complaint also contains an allegation that the Ministry and the Union acted in concert to undermine the duly elected executive of Local 508.

As we understand the present complaint, Messrs. Glenny and Gondor allege that the Ministry moved certain employees who were also members of the executive of Local 508 from the Ferguson Block to College Park with a view to undermining the functioning of the Local executive. Whereas employees at the Ferguson Block were represented by Local 508, employees at College Park were represented by Local 520. As a result, an issue arose as to which Local was to have jurisdiction over the transferred employees. This issue was referred to Jim Clancy, the President

of the Union, who ruled that, in accordance with the Union's policy on Mergers, Transfers and Division of Locals, the members of Local 508 who were transferred from the Ferguson Block to College Park came within the jurisdiction of Local 520. The effect of this ruling was that the Complainants ceased to be President and Vice-President of Local 508 although they were permitted to retain carriage of grievances initiated by the executive of the Local prior to the move to College Park. In the amended complaint, Messrs. Glenny and Gondor further allege that management was improperly involved in the circulation of two petitions relating to the affairs of the Local and that this action was also intended to interfere with the functioning of the Local executive.

At the outset of the hearing, Counsel for the Respondents indicated that there were certain preliminary matters they wished to address and it is the disposition of these matters which is the subject of this Interim Decision.

It was the submission of Mr. Law, on behalf of the Respondent Union, that the Union cannot be the object of a complaint under Section 29 of the Crown Employees Collective Bargaining Act. Mr. Law further contended that the essence of the Complaint against the Union relates to the ruling made by Mr. Clancy as to the jurisdiction of Locals 508 and 520. This, it was submitted, is an internal union matter and cannot constitute

a violation of the Crown Employees Collective Bargaining Act. Alternatively, and in the event that the Tribunal were to conclude that it has jurisdiction to entertain the complaint, Mr. Law contended that the complaint is lacking in particularity; that the Complainants failed to respond to a number of demands for particulars and, that in these circumstances, the complaint should be dismissed.

It was the submission of Mr. Little, on behalf of the Respondent Ministry, that although Messrs. Glenny and Gondor have alleged a conspiracy between the Ministry and the Union, the real complaint is against the Union. Mr. Little agreed with Mr. Law that the complaint against the Union cannot stand and as the complaint against the Ministry is framed in conspiracy, he submitted that it, too, must fail. Alternatively, Mr. Little contended that the complaint against the Ministry must be dismissed for lack of particularity. He submitted that the Complainants failed to adequately respond to a number of demands for particulars made by the Ministry and he contended that it is simply too late to permit them to remedy this defect.

It was the submission of Mr. Kopyto, on behalf of the Complainants, that the amended complaint is not lacking in particularity and that Regulation 233 to the Crown Employees Collective Bargaining Act requires only that a concise statement of material facts be provided and not the evidence which may go

to prove those facts. In any event, Mr. Kopyto contended that if the complaint is lacking in particularity, the appropriate course is to direct the Complainants to provide the necessary particulars but not to dismiss the complaint.

Mr. Kopyto further submitted that the Complainants are not alleging that the Ministry and the Union conspired together to undermine the executive of Local 508 but rather that each of the Respondents acted in a manner intended to accomplish this result. This, it was contended, constitutes a proper basis for complaint against the Ministry and against the Union. Although Mr. Kopyto acknowledged that the complaint against the Union relates to the ruling of Mr. Clancy as to the jurisdiction of Locals 508 and 520, he submitted that this is more than an internal union matter. In fact, he suggested that the Union's conduct involved a breach of the duty of fair representation which is set out in Section 30 of the Crown Employees Collective Bargaining Act and he requested that the complaint be amended in this regard.

The first issue for determination, then, is whether the conduct in which the Ministry and the Union are alleged to have engaged could, if proven, constitute a violation of the Crown Employees Collective Bargaining Act. If the complaint contains no statement of material fact which could involve such a

violation, then the Tribunal is without jurisdiction to entertain the complaint and it must be dismissed.

In both the initial and amended complaints, it is alleged that the Respondents violated Sections 29(1),(2) and (3) of the Crown Employees Collective Bargaining Act. As set out above, Section 29(1) relates to interference with an employee organization while Section 29(2) addresses interference with employee rights. Although both of these Sections contemplate that a violation can be committed by "a person acting on behalf of the employer", Mr. Kopyto acknowledged that the Complainants are not now alleging that the Union acted on behalf of the Ministry for this purpose. Although Mr. Kopyto suggested if the evidence were to reveal that this occurred, he would seek leave to amend the complaint, the Tribunal will not permit its proceedings to be used as a fishing expedition to enable a party to discover whether there is any basis for a complaint. As a result, and without deciding whether a union can act on behalf of an employer for purposes of Sections 29(1) and (2) of the Act, as this is not presently alleged, the Tribunal finds that these Sections cannot support the complaint against the Union.

Section 29(3) of the Act, on the other hand, provides that an employee organization shall not seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of an employee

organization or to refrain from exercising any other rights under the Act or from performing any obligations under the Act. While this Section then clearly proscribes certain conduct on the part of the union, neither the original or amended complaint in this case contains any allegation of coercion or intimidation in relation to the activities set out. Moreover, we understand from Mr. Kopyto that the complaint against the Union is now said to involve a breach of the duty of fair representation which is contained in section 30 of the Act. This Section provides as follows:

> 30. An employee organization shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees, whether members of the employee organization or not.

Even if the Tribunal were to permit an amendment to the complaint as requested by Mr. Kopyto, however, the facts as alleged could not constitute a violation of Section 30 of the Crown Employees Collective Bargaining Act. The duty of fair representation relates to the representation of employees vis-a-vis the employer and not to internal union affairs.

In considering a provision similar to Section 30 in Colalillo v. United Auto Workers International and Local 525 [1982] OLRB Rep. July 1066, the Ontario Labour Relations Board had this to say:

The real issue between the complainant and the respondent is the complainant's eligibility to run for the Union position of steward, and the employer understandably has taken no position on that matter. The dispute between the complainant and her trade union, in other words, is wholly internal. The duty of fair representation in section 68 on the other hand, is concerned only with the representation by a trade union of an employee vis-a-vis his or her employer. See Ford Motor Company [1973] OLRB Rep. Oct. 519; Myrna Wood [1981] OLRB Rep. Feb 137; Frank Manoni [1981] OLRB Rep. Dec. 1775; Softley Cartage, Board File No. 1347-81-U, released May 26, 1982. It is only because the employee's normal rights to deal directly with the employer are circumscribed by collective-bargaining law that the duty of fair representation arises. As the Board stated in Frank Manoni, supra, at paragraph 11:

> ...The arbitrary, discriminatory or bad faith conduct, directed at such employees and regulated by the section must be such as to produce actual, and not merely speculative prejudice top those employees at the hands of their employer.

As the Board also noted in Mario Moreira, [1980] OLRB Rep. July 1039:

> ...this Board has no specific authority under the Act to undertake any sort of watchdog role over a union's internal processes under its constitution and by-laws.

And also in Arthur Joseph Roberts, [1974] OLRB Rep. March 169 the Board stated:

> 8....the duty of fair representation owed by a trade union to an employee under section 60 [now section 68] of the Act does not contemplate controlling the manner in which a trade union conducts its affairs with its elected officials whether they be on the payroll or not. The case law indicates that the propriety of a trade union's behaviour vis a vis its members is governed by its constitution and by-laws and the procedural remedies provided therein. And recourse must be made by an aggrieved member to the governing rules under the constitution for relief. The safeguard provided by the controlling supervision of the courts are his assurance that the rules will be implemented fairly and impartially. (See White v Kuzych (1951), A.C. 585; Lee v Showmans Guild (1952), All. E.R. 1175;

Orchard v Tunney (1957), S.C.R. 436; 8 D.L.R. 273; Jurak et al v Cunningham (No 1) (1959), 20 D.L.R.(2d) 377; Jurak et al v Cunningham (No. 2) (1959), 20 D.L.R.(2d) 381; Gee v Freeman et al (1958), 26 W.W.R. 546).

In our view, the jurisdiction of the Tribunal under Section 30 of the Crown Employees Collective Bargaining Act is similar to the jurisdiction of the Ontario Labour Relations Board under section 68 of the Labour Relations Act. In both instances, the duty of fair representation relates to the representation of employees in their dealings with the employer and does not extend to internal disputes between the union and its members.

In this case, the Complainants take issue with a ruling made by Mr. Clancy, the President of the Union, in relation to the jurisdiction of two Locals. This, we find, is an internal union matter and one over which the Tribunal has no jurisdiction under the Crown Employees Collective Bargaining Act. In the result, the Complaint against the Union must be dismissed.

Although the amended complaint alleges that the Ministry and the Union acted in concert to undermine the operation of the executive of Local 508, the dismissal of the complaint against the Union does not dictate that the complaint against the Ministry must also be dismissed. The Complainants continue to allege that the Ministry moved certain employees from the Ferguson Block to College Park with a view to undermining the

functioning of the Local executive. The Complainants also contend that the Ministry was involved in the circulation of two petitions for a similar purpose. If proven, such action on the part of the Ministry could constitute a violation of Section 29 of the Act and to this extent, the Tribunal has jurisdiction to entertain the Complaint.

We agree with Mr. Little, however, that the portion of the complaint relating to management's involvement in the circulation of the two petitions is lacking in particularity and that this has not been entirely rectified by certain correspondence forwarded to Mr. Little by the Complainants' previous Solicitor, Mr. Rotman. Although the Tribunal is not prepared to dismiss the complaint for lack of particularity, the Complainants are directed to provide the Ministry with the names of the members of management alleged to have been involved in the circulation of the petitions, the material facts relied upon to support their involvement as well as the approximate times and locations at which such conduct occurred. The Complainants shall also provide the Ministry with copies of all documentation referred to in the amended complaint which is relevant to its claim against the Ministry. The particulars and relevant documentation shall be delivered to the Ministry and filed with the Tribunal within thirty days of the date of this Decision.

The final matter in issue relates to certain summonses which were served by the Complainants but in respect of which no conduct money was paid. Mr. Little requested that we direct the Complainants to pay conduct money to two members of management who attended hearings before the Tribunal on December 9, 1988 and January 11, 1990 pursuant to summonses served by the Complainants. Mr. Law also requested that we direct the Complainants to pay conduct money to Mr. Clancy who remained on call pursuant to a summons issued to attend the hearing on January 11th. Mr. Kopyto took the position, however, that the Tribunal has no jurisdiction to direct the payment of conduct money and that the enforcement of summonses is a matter for the Supreme Court of Ontario under the Statutory Powers Procedure Act.

In Cement, Lime, Gypsum and Allied Workers Division of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers and its Local 576 v. Hamilton Automatic Vending Company Limited [1989] OLRB Rep March 248, the Ontario Labour Relations Board considered its authority to direct the payment of conduct money in similar circumstances and concluded as follows:

> 19. Under the Labour Relations Act, the Board has the power to summon and enforce the attendance of witnesses and compel them to give evidence under oath and to produce such documents and things as the Board may require. The Board also has the power to determine its own practice and procedure. The Board's power to summons witnesses and compel

their testimony is repeated in section 12 of the Statutory Powers Procedure Act which, in subsection 2, subparagraph (c), adds the requirement that a summons issued by the Board

> shall be served personally on the person summoned who shall be paid the like fees and allowances for his attendance as a witness before the tribunal as are paid for the attendance of a witness summoned to attend before the Supreme Court.

Where a summons is issued by this Board at the request of one of the parties to proceedings before it, that party is expected to effect service and pay conduct money in accordance with this requirement. It is on this basis that parties are provided with summonses at their request. Although neither the Labour Relations Act nor the Statutory Powers Procedure Act ("the SPPA") expressly confers on the Board the power to enforce payment of conduct money, it seems to us that this must be concomitant of the express power to summons and compel attendance of witnesses, particularly in circumstances where natural justice requires that power be exercised on behalf of and at the request of parties to proceedings. It is part of the Board's process that conduct money be paid by the parties who request and effect service of a summons. It is arguably an abuse of the Board's process to make use of a summons without discharging the corresponding obligation with respect to conduct money.

20. Subsection 23(1) of the SPPA provides:

> A tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes.

If the power to enforce payment of conduct money by a person who uses a Board's summons is not implicit in the Board's powers to determine its own practice and procedure and to summons and compel the attendance of witnesses, then it seems to us that such a power must flow from subsection 23(1) of the Statutory Powers Procedure Act. We are in no doubt of the potential for abuse of the Board's processes by the use of its summonses. A finding that such abuse has occurred is not a prerequisite to the exercise of our power under subsection 23(1) of the SPPA. In order to ensure that such an abuse has not and does not occur in

> relation to the Board's proceedings, we consider it appropriate for the Board to direct that the conduct money to which Zelma Cochrane and Ann Barlowe became entitled as a result of the respondent's use of the Board's summons in File 0577-88-U be paid by the respondent forthwith together with interest thereon. While the panel before whom a witness is summoned would ordinarily be the best situated to deal with the matter of conduct money, we are satisfied in this case that a referral of this particular issue to the original panel at this point would cause undue delay and would, furthermore, be entirely unnecessary, as we have before us a sufficient basis on which to deal with it ourselves.

Like the Labour Relations Board, the Tribunal has authority under the Crown Employees Collective Bargaining Act to summons and compel the attendance of witnesses and to determine its own practice and procedure. Like the Labour Relations Board, the Tribunal also routinely issues summonses at the request of a party to proceedings before it and expects that such summonses will be personally served with the appropriate conduct money as provided by the Statutory Powers Procedure Act. Where conduct money is not paid as required, the Tribunal finds that it has jurisdiction to direct that payment be made either by virtue of its authority to determine its own practice and procedure or because it may make orders to prevent abuse of its processes in accordance with Section 23(1) of the Statutory Powers Procedure Act.

In the result, the Complainants are directed to pay conduct money forthwith to the two members of management who

attended hearings before the Tribunal on December 9, 1988 and January 11, 1990 pursuant to summonses served by the Complainants. Because Mr. Clancy remained on call and did not actually attend the hearing on January 11, 1990, the Tribunal declines to award conduct money to him in respect of that date.

The hearing of the complaint against the Ministry shall proceed on the merits in accordance with the directions contained herein.

DATED AT TORONTO, this 13th day of March, 1990.

J.H DEVLIN, VICE-CHAIRPERSON

M. SULLIVAN, MEMBER

C. BOETTCHER, MEMBER

Ontario Public Service
Labour
Relations
Tribunal

Fonction Publique de l'Ontario
Tribunal Administratif
des Relations
du Travail

180 Dundas Street West, Suite 2100, Toronto, Ontario M5G 1Z8

416/598-0688

T/0014/87

IN THE MATTER OF AN ARBITRATION

Under

THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

Before

THE LABOUR RELATIONS TRIBUNAL

Between: OPSEU (Lasani) **Complainant**

- and -

The Crown in the Right of Ontario
(Ministry of Community & Social Services) **Respondent**

Before:

M.G. Mitchnick	**Alternate Chairperson**
D. Bonazzo	**Member**
J. McGivney	**Member**

For the Complainant:

A. Ryder
Counsel
Gowling & Henderson
Barristers and Solicitors

For the Respondent:

L. Horton
Staff Relations Officer
Staff Relations Branch
Management Board of Cabinet

Hearings: January 4, 5, 1989

DECISION

This is an application under section 40(1) of the Crown Employees Collective Bargaining Act, which provides:

> If, in the course of bargaining for a collective agreement or during the period of operation of a collective agreement, a question arises as to whether a person is an employee, the question may be referred to the Tribunal and its decision thereon is final and binding for all purposes.

Normally such "questions" under section 40 come before the Tribunal in direct form: i.e., the dispute between the parties arises out of the fact that the Union forms the view that a particular position or group of positions ought to be viewed as falling within the bargaining unit, whereas the employer has been treating or has decided to treat those positions as excluded. In the present case the excluded position in dispute has been in existence (as a "managerial" position) since 1973 or '74, and no such question had ever arisen between the Union and the employer until the event giving rise to these proceedings. That event was the holding of a competition in late 1983 to fill a vacancy in the position, which was then titled Supervisor of Rehabilitation & Employment Programs, and for which Mr. A. Lasani, one of the Vocational and Rehabilitation Services Counsellors reporting to the position, applied. The position, however, went to Ms. Phyllis Tiffany, who is now the incumbent, and Mr. Lasani grieved.

Prior to the scheduled hearing date for Mr. Lasani's grievance before the Grievance Settlement Board, the employer formally advised the Union that it would be raising the objection that the position sought by the grievor was an excluded one, being managerial, and that the Board accordingly did not have the jurisdiction to proceed with the grievance. Given the nature of the employer's objection, going to the status of the position in dispute, the Grievance Settlement Board, by decision dated May 15, 1987 (GSB File #147/84) adjourned the proceedings sine die, in order to allow the parties to proceed before the Public Service Labour Relations Tribunal, under section 40, to obtain a determination of the status of the position in dispute. Counsel for the Union, Mr. Ryder, accordingly wrote to the Tribunal the following letter, dated June 12, 1987:

June 12, 1987

DELIVERED

Ms. Theresa Comache
Ontario Public Service
Labour Relations Tribunal
Suite 2100
180 Dundas Street West
Toronto, Ontario
M5G 1Z8

Dear Ms Comache:

Re: OPSEU - Lasani
Ministry of Health

We act for OPSEU with respect to a grievance brought on behalf of Aquil Lasani which claims he was not properly considered in a competition for the position of Rehabilitation and Employer Supervisor. The Ministry has characterized the position as managerial and the union contends that it is a bargaining unit position.

The Board adjourned the arbitration proceedings sine die to allow the parties to proceed to the Tribunal to have it determined the status of the position. Enclosed herewith is a copy of the Board's decision in this respect.

Would you therefore be good enough to treat this letter as an application on behalf of the union to the Tribunal to determine the status of the Rehabilitation and Employment Supervisor Position.

Yours very truly,

Alick Ryder

AR/m
encl.
c.c. Mike Pratt
Ann McChesney

When the matter came before the Tribunal, the employer took the position throughout that the relevant "person" to be considered for the purposes of the section 40(1) application was the person selected to fill the vacancy in dispute, being Ms. Tiffany, but that the Tribunal had to confine its inquiry, and the effective date of its declaration, to the date that the application was actually filed with the Tribunal. And, more importantly, the employer indicated that it would be arguing before the Grievance Settlement Board,

should the Union be successful on the issue of status and the matter return there, that the Tribunal's determination, speaking as it must of the position only as it existed on June 12, 1987 (the application date), would be of no assistance whatever to Mr. Lasani in his grievance which claimed entitlement to the position as posted and filled in December 1983. In other words, the Grievance Settlement Board having decided on the positions taken before it that it was not the proper forum to assess the employer's first line of defence (that the posting that Mr. Lasani had unsuccessfully applied for was managerial in any event), the employer's position before the Tribunal was that the Tribunal was not capable of making a determination on that defence either.

Counsel for the Union, Mr. Ryder, was, needless to say, greatly disturbed by the position taken before us by the employer, particularly since he had represented the Union at the proceedings before the Grievance Settlement Board, and indicated that it was the submission of the employer there, in opposition to the position taken by the Union, that the "status" issue was one which the Grievance Settlement Board ought not to deal with on its own, but rather should defer to the Tribunal. Ms. Horton, who appeared before us on behalf of the employer on the initial day of hearing, had not been present at the proceedings before the Grievance Settlement

Board, but indicated that it was her understanding that the employer had done nothing to encourage the Board to refer this matter to the Tribunal.

The parties offered to have counsel representing both sides at the Grievance Settlement Board hearings come and testify before us as to what was said, but the Tribunal indicated that that would not be necessary. That was because the Tribunal was of the view, in any event, that the Board, in its decision referring the "status" issue to the Tribunal, acted entirely in accordance with the general division of responsibilities under the statute, and with the normal practice of the Board and the Tribunal with respect to such matters. That practice, we might note, is also in accordance with the line of demarcation drawn by the Ontario Labour Relations Board between itself and boards of arbitration over issues of exclusion from the scope of a collective agreement; see, e.g., Nelson Crushed Stone, [1980] OLRB Rep. October 1500. The Union had adequate notice prior to the Grievance Settlement Board hearing that the employer was continuing in the view that the posted position was managerial, and the procedure adopted by the Grievance Settlement Board, while possibly not the only option open in law, was, in light of the long-standing jurisprudence between the Board and the Tribunal, not an unfair one. The matter having now been referred to us, however, we

would simply state that we have no doubt whatever that the issue of status is capable of being determined by us in a way that is relevant to the manner in which the issue in fact arose: i.e., as the employer's initial stage of defence to the grievance that was filed over the 1983 posting. We can and will, in other words, determine what obviously is the real issue that arose between the parties, being the status of the position of Rehabilitation and Employment Program Supervisor as posted and unsuccessfully applied for by Mr. Lasani, and we reject as disappointingly technical and without substance the position to the contrary pursued by the employer throughout the course of the proceedings before us.

The "status" issue, as we have noted, arose in this case in a relatively unusual way, i.e., as an offshoot of Mr. Lasani's grievance over the posting, and in that context there does in fact arise some question over whom the appropriate "person" to be examined is under section 40(1), for the purpose of ascertaining the duties and responsibilities of the disputed position as of the date that is here relevant. That date, once again, is the date of the employer's decision as to whom to select for the job, since that is the decision that the Union seeks to attack in its grievance on behalf of Mr. Lasani, and the decision that the employer argues, by virtue of the position being managerial, is beyond the

Grievance Settlement Board's scope of review. As a practical matter, however, we agreed with the employer's proffering of the successful candidate on the position, Ms. Tiffany, as an appropriate witness to give an "incumbent's" point of view of what duties and responsibilities the job that was awarded has actually entailed in practice. The Tribunal also noted that the application under section 40(1) itself, which, for the procedural reasons outlined above did not come to be filed until June of 1987, would be given its normal prospective effect of limiting the scope of relevant evidence to the date of such application, so as to provide a clear dividing-line from any changes to the duties and responsibilities occurring subsequent to the application. That same distinction as to any changes in the job might arguably have had to have been made from the time the position was posted and awarded, to the later date of the application, but in the present case neither party took the position that the job had altered in any way from the time of the posting or, in fact, of the predecessor incumbent.

With respect to the "merits" of the case before us we note as a starting point, once again, that the same position has essentially existed and been excluded without challenge for a substantial period of time. In OPSEU (S. Silverthorne) and the Ministry of Health). T30/87, released May 20/88, the Tribunal observed, at pages 9-10:

The "evidentiary burden" is, of course, something different from the "legal burden", and will often shift back and forth over the course of a case, depending on the nature of the evidence that the Tribunal at a particular point has in front of it, and the conclusion that that evidence, if unrebutted, appears to support. And it is in that connection that the second question arises in this case, in terms of the effect of evidence that a position now in dispute had been either included in or excluded from the bargaining unit over a substantial period of time, without any apparent problem. In that regard the respondent notes that the Tribunal in T10/76, issued December 23, 1977, observed at page 6

> Second, there is the hard fact that Mr. Williams has been a member of the bargaining unit for some time without any impairment of his functions. In previous test cases before the Tribunal we have scrupulously avoided any discussion or consideration as to whether persons before us under Section 38 were or were not members of the bargaining unit, preferring to view such applications as fresh and without any relationship to the past practice of the parties.

As the applicant notes, however, the Ontario Labour Relations Board, in the Corporation of the City of Thunder Bay, for example, [1981] OLRB Rep. August 1121, has had this to say, at para. 7:

> (2) A party which is attempting to alter a status quo which reflected the earlier perceptions of the parties concerning an individual's status, and which has apparently worked adequately for some years must recognize the importance of this historical dimension, and be prepared to adduce clear evidence as to why a change is required to accommodate the interests section 1(3)(b) was designed to protect.

> Those comments by the Board, it seems to us, do no more than attempt to reflect what the Board saw as the reality of that type of situation, in terms of what impact a lengthy history of acceptance of one status or the other of a person or position is likely to have upon the adjudicator - in the absence of compelling evidence leading the adjudicator to a conclusion that is to the contrary. We agree with that practical assessment by the Ontario Labour Relations Board, and consider that it would be a useful guide to the public-service community to re-iterate it here.

Apparently mindful of those comments, the Union adduced evidence from Mr. Victor Lucas, a Vocational Rehabilitation Counsellor in this Hamilton office, and chairman of the Vocational Rehabilitation Counsellor Division of OPSEU, which evidence it said would demonstrate that the "historical dimension" apparently in favour of management here was in fact only a more recent one, and that the responsibilities of the position have "traditionally" been performed by members of the bargaining unit. All that evidence demonstrated, however, is that as of 1965, there were only 3 Vocational and Rehabilitation Counsellors operating in the Hamilton area, with no management personnel to direct their activities, other than at Queen's Park, and that one of the three Counsellors was designated as the "Senior" counsellor, acting in the capacity of what in industry might be termed a "lead hand". Over time, however, the "Hamilton area" as an administrative unit of the Ministry has greatly expanded, to now include Halton and the Regional Municipality of Niagara, and the complement of

professional and clerical staff has grown accordingly. The "Senior" counsellor, who by 1968 came to be classified as a "Social Work Supervisor I (Bargaining Unit)", by 1973 or '74 was upgraded and re-named the present "Rehabilitation and Employment program Supervisor", and the position from that time forward has been treated as "managerial" and excluded from the bargaining unit. The position currently has 6-8 Vocational and Rehabilitation Counsellors reporting directly to it. In 1975 an "Area Manager" was moved into the Hamilton office itself, and in 1977 or '78 the present structure was completed with the addition of a "Manager of Direct Services", being the program area here under review. The current incumbent of that lattermost position is David Vice, who testified that his overall responsibilities keep him out of the Hamilton Office 60-70 per cent of his time.

On the evidence we are satisfied that the present incumbent of the position of Rehabilitation and Employment Program Supervisor, Ms. Tiffany, was expected to and does assume the day-to-day responsibility for supervising the program delivery and work performance of the 6 Vocational and Rehabilitation Counsellors reporting to her. While she may often act in the role of a facilitator or consultant amongst this group of professionals, she carries no caseload of her own, and her role and authority, whatever may have been the

case in the early days of the Senior Counsellor or Supervisor, clearly goes beyond providing professional assistance in a collegial atmosphere. As the Tribunal observed in the Burton decision, T7/79, issued March 26, 1980, at page 5:

> One must be careful in evaluating alleged authority where it is not frequently exercised. In some cases a person does not utilize their alleged authority because it has in reality been eroded by a system that has dispersed it so that other functionally utilize that authority that is alleged to reside in one particular person. In other cases that authority will not be exercised, not as a result of any erosion or dispersion of functions to others, but because operationally the organization runs smoothly and without any real problems but in reality the authority is retained.

The Tribunal considers the latter comment to be apposite with respect to the situation as we listened to it being described here. The definition of who is (or rather, is not) an "employee" has also been more explicitly defined under this statute than, for example, under the Labour Relations Act, and in particular excludes under section 1(1)(l) a person who:

> (iii) spends a significant portion of his time in the supervision of employees,
>
> (iv) is required by reason of his duties or responsibilities to deal formally on behalf of the employer with a grievance of an employee.

About subsection (iii) the Tribunal in Bethel (T9/76, issued April 6, 1977) wrote, at page 10:

> There are a number of observations which can be made about the subsection. First, it confines the managerial employee to someone who deals with employees. In our view the intent of the subsection is to exclude from the bargaining unit those persons who are responsible for seeing that the work gets done and that the collective agreement is adhered to. A person who supervises other employees should not be placed in a position where his identification with management's interests may be diluted by his participation in the bargaining unit.

We are satisfied on the evidence that Ms. Tiffany has the authority and is regularly required to make her own independent judgments with respect to the employment relationship of the staff working under her, including the hiring process, suitability for regular employment beyond the probation period, the need for disciplinary steps as opposed to simple counselling, the carrying out of formal performance evaluations, with a view to the granting or withholding of a merit increase, and the granting of casual time off. While certain of these employment functions are required, either by collective agreement or regulation, to have the signature of the Manager of the overall area, we are satisfied that the power of effective recommendation is expected to and does reside with Ms. Tiffany. Ms. Tiffany is also responsible for the day-to-day administration of the collective agreement, and

was the one required to formally reply on behalf of management (Step One under the agreement) to the only grievance that has come before her. Mr. Ryder in argument fairly points to the lack of any attempt whatever on the part of the employer to produce documentary examples of the exercise of Ms. Tiffany's claimed responsibilities, and in a different context, such lack of corroboration of that kind might well tip the balance against the employer. In light of Ms. Tiffany's own credibility as a witness, however, together with the fact that the employer's claims are consistent with the way this position has been regarded for years, we do not find the employer's omissions here to be determinative. On the latter of those two points, we note Mr. Ryder's further argument that the addition of two new levels of management (Area Manager, Direct Services Manager) since the days of the Senior Counsellor or bargaining-unit Supervisor means that the supervisory responsibilities of the latter position must be less extensive than they had been in those earlier years. That argument, however, entirely fails to give consideration to the growth in jurisdiction and staff-complement for that "Hamilton area" office over this period of time.

On all the evidence, we are satisfied that the posted position of Rehabilitation and Employment Program Supervisor was a managerial one, and that Phyllis Tiffany on her assumption of that position in January of 1984 became a person excluded from the coverage of the Crown Employees Collective Bargaining Act.

DATED at Toronto this 2nd day of May, 1989.

M. G. Mitchnick - Alternate Chairperson

D. Bonazzo - Member

J. McGivney - Member

Ontario Public Service
Labour
Relations
Tribunal

tion Publique de l'Ontario
Tribunal Administratif
des Relations
du Travail

180 Dundas Street West, Suite 2100, Toronto, Ontario M5G 1Z8

416/598-0689

Crown Employees Collective Bargaining Act, R.S.O. 1980, c.108

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

T/0016/87

Between:

Tymen Evink

Applicant

and

Ontario Public Service Employees Union

Respondent
Employee Organization

and

The Crown in Right of Ontario
(Ministry of Transportation and Communications)

Respondent
Employer or
Representative of
the Employer

Before:	J. H. Devlin	Vice Chairman
	William J. Walsh	Member
	J. H. McGivney	Member

For the Applicant: Tymen Evink, in person

For the Respondent: Nancy Coughlan
Grievance Officer
Ontario Public Service Employees Union

Hearing: November 12, 1987

This is an application pursuant to Section 16(2) of the Crown Employees Collective Bargaining Act wherein the applicant, Tymen Evink, seeks exemption from the payment of dues to the respondent employee organization because of his religious convictions.

Mr. Evink is a member of the Canadian Reform Church which he joined shortly after coming to Canada in 1980. Prior to that, Mr. Evink had a similar religious affiliation in Holland. Mr. Evink testified that his religious beliefs conflict with the aims and purposes of the respondent union as outlined in its constitution. As a matter of religious faith, Mr. Evink testified that he has been taught to honour those appointed above him which includes his employer. Mr. Evink explained that this higher duty to his employer conflicts with the union's expressed purpose of defending the right of employees to strike and of strengthening the labour movement. Mr. Evink testified that he cannot serve two masters.

Although Mr. Evink began full-time employment with the Ministry in 1984, he testified that it was not until he became a confession member of his church in the spring of 1987 that he became aware of the union constitution. At this time, he testified that he came to appreciate the conflict between his religious beliefs and the aims and purposes of the union. Mr. Evink admitted that, in the past, he filed a grievance although he testified that he did so as a means of obtaining information

from the employer. In filing this grievance, it was not Mr. Evink's intention to challenge the authority of the employer.

The Tribunal is of the view that the applicant is sincere in his religious beliefs and we find that his objection to the payment of dues stems directly from those beliefs. As a result, there exists the necessary nexus between Mr. Evink's religious convictions and his objection to the payment of dues. Accordingly, we order that the provisions of the collective agreement pertaining to the payment of dues or contributions to the respondent employee organization do not apply to the applicant and he shall not be required to pay dues or contributions to the Ontario Public Service Employees Union. Amounts equivalent to such dues or contributions shall be remitted by the employer to a charitable organization mutually agreed upon by the applicant and by the respondent union. In the event that they are unable to agree, they shall so advise the Tribunal in writing and shall include representations as to the charitable organization to be designated by the Tribunal. The Tribunal retains jurisdiction to deal with this matter.

DATED AT TORONTO, this 12th day of January , 1988.

For the Tribunal

Ontario Public Service Labour Relations Tribunal
Fonction publique de l'Ontario Tribunal Administratif des Relations du Travail

180 Dundas Street West, Suite 2100, Toronto, Ontario M5G 1Z8

416 598 0[illegible]

T/0017/87

Crown Employees Collective Bargaining Act
R.S.O. 1980, c.108

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

Between: J. S. Walker

Complainant

and

The Crown in Right of Ontario
(Ontario Liquor Board Employees' Union
J. Miles, J. Chaykowsky & G. Ravary)

Respondents

Before:

J. H. Devlin	Vice Chairman
W. Walsh	Member
R. Drennan	Member

For the Complainant: J. S. Walker

For the Respondent: M. Zigler
Counsel
Koskie and Minsky
Barristers and Solicitors

Hearing: January 22, 1988

DECISION

This matter involves a complaint pursuant to Section 32 of the Crown Employees Collective Bargaining Act which was filed by J.S. Walker. The Complainant did not appear at the hearing and Mr. Zigler, who appeared on behalf of the Respondents, advised that Mr. Walker had contacted his office on January 21, 1988 and had indicated that he did not intend to proceed with his complaint. We were also informed that a similar message was conveyed to the Registrar of the Tribunal. Upon the application of Counsel for the Respondents, the complaint of Mr. Walker is dismissed.

DATED AT TORONTO, this 22nd day of January, 1988.

J. H. Devlin - Vice Chairman

W. Walsh - Member

R. Drennan - Member

T/0026/87

Ontario Public Service Labour Relations Tribunal
Fonction Publique de l'Ontario Tribunal Administratif des Relations du Travail

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T/26/87

CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

R.S.O. 1980, C. 108

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

Between:

Ontario Public Service Employees Union

Applicant

- and -

The Crown in Right of Ontario
(Ministry of The Attorney General)

Respondent

Re:	Sheriff's Officers	
Before:	Pamela C. Picher	Chair
	J. H. McGivney	Member
	K. McDonald	Member
For the Applicant:	Barbara Linds Ontario Public Service Employees Union	
For the Respondent:	John Zarudny Crown Law Office	
Hearings:	December 1, 1988 and February 21, 1989	

DECISION

A question has arisen between The Ontario Public Service Employees Union and The Crown in ight of Ontario (Ministry of The Attorney General) as to whether certain persons employed as Sheriff's fficers are employees within the meaning of section 1(1)(f) of the **Crown Employees Collective argaining Act**, R.S.O. 1980 c. 108. The persons in question are described by the parties as, "Baldacchin, reen, Jurens-James, Jurens-Jaxon, Mitchell, Muthig, Usher and all other persons occupying the position Sheriff's Officer in the Judicial District of York who are presently excluded from the bargaining unit". The uestion was referred to the Tribunal pursuant to the provisions of section 40 (1) of **C.E.C.B.A.** which rovides as follows:

> **40 - (1)** If, in the course of bargaining for a collective agreement or during the period of operation of a collective agreement, a question arises as to whether a person is an employee, the question may be referred to the Tribunal and its decision thereon is final and binding for all purposes.

It is the position of the Union that these Sheriff's Officers (referred to as **fee officers**) are mployees for the purposes of the **Act**. The Ministry, on the other hand, argues that they are not mployees of the Crown and are instead independent contractors.

Section 1(1)(f) of the Act defines "employee" as follows:

> 1(1)(f) "employee" means a Crown employee as defined in the *Public Service Act* but does not include, . . .
>
> [10 exclusions are then set out]

At this stage of the proceeding the Crown does not suggest that the fee officers fall within any of ese ten exceptions or exclusions which apply to persons who are otherwise employees. The parties ree that the application of one of the ten listed exceptions to employee status, that contained in section 1)(f)(vi) of **C.E.C.B.A.** ("a person not ordinarily required to work more than one-third of the normal riod for persons performing similar work except where the person works on a regular and continuing sis"),

will not be addressed by the Tribunal at this stage. The parties have asked the Tribunal for a basic determination of the employee status of the fee officers and subsequently, themselves, will consider the applicability of the exception contained in section 1(1)(f)(vi) on a case by case basis and, if required, return to the Tribunal for a determination of the issue. It is the position of the Crown that the fee officers do not fall within the basic definition of "employee" under the **Act** which incorporates, by reference, the definition of "Crown employee" under section 1 (e) of the **Public Service Act**, R.S.O., 1980 c.418:

> (e) "Crown employee" means a person employed in the service of the Crown or any agency of the Crown, but does not include an employee of Ontario Hydro or the Ontario Northland Transportation Commission;

For clarity it may be noted that it is undisputed that the sheriff's officers who are referred to as classified officers I and II are employees. They are represented by O.P.S.E.U. and fall within the public service bargaining unit. The classified Sheriff's Officers I perform the same function as the fee officers in dispute.

The application by O.P.S.E.U. for a determination of the employee status of the fee officers applies to all fee officers in the Province. The parties have agreed, however, to limit their agreed statement of fact (set out below) to the circumstances in the Judicial District of York. Once the Tribunal renders a determination of the status of the fee officers in the Judicial District of York, the parties will attempt to resolve the employee status of the fee officers in the rest of the Province on the basis of that determination. If they are unable to do so they will return to the Tribunal for further determination.

A. FACTS:

The parties came to an agreed statement of facts which may be summarized as follows:

1. The Ministry of The Attorney General for the Province of Ontario superintends all matters connected with the Administration of justice as set out in section 5 of **The Ministry of the Attorney General Act**:

5. The Attorney General

(c) shall superintend all matters connected with the administration of justice in Ontario;

Under **The Courts of Justice Act** (at section 212), the Attorney General recommends the appointment of a Sheriff for each county and district. The Sheriff may appoint a Deputy Sheriff with the approval of The Attorney General. The **Act** further stipulates the hours that the sheriff's office must be open for business.

2. Role of the Sheriff: The Sheriff is a court administrative official, appointed under the **Sheriff's Act**. Under section 2 of that **Act**, the Sheriff is charged with responsibility for the **enforcement of Orders** of the Courts. Examples of enforcement actions include: seizure of debtors' assets and their sale, by auction, in order to satisfy judgement debts pursuant to a Writ of Seizure and Sale; eviction of tenants pursuant to a Writ of Possession; return of personal property to a party pursuant to an Order for Interim Recovery of Personal Property; and arresting individuals to bring them before the court pursuant to a Warrant of Committal.

In addition, the Sheriff may **service documents** involved in various steps of the court process on behalf of a party to an action. This function, referred to as "process serving", is not an exclusive responsibility of the Sheriff. Parties to court proceedings may, at their option, effect service themselves, or use other private individuals/companies who perform process serving rather than the Sheriff. A significant portion of process serving within the province is performed by private process servers and does not involve the Sheriff's office.

For the performance of various enforcement actions and process serving, Sheriffs charge litigants a fee set by **Ontario Regulation 609/86** of the **Administration of Justice Act**. These regulations also allow the Sheriff to charge other expenses reasonably incurred in the performance of such services, such as travel expenses:

FEES – SHERIFFS
(O. Reg. 609/86)

The following fees are payable to sheriffs:

1.	On receipt by a sheriff of any document for service on any one person, exclusive of travelling allowance.	$13.00
2.	For postage and handling of a copy of a document where service is effected in the manner prescribed by subrule 16.03 (5) of the Rules of Civil Procedure.	5.00
3.	On the filing of any writ of execution or order, or renewal thereof, which a sheriff is liable or required to enforce.	15.00
4.	For each delivery of a copy of a writ of execution or a renewal thereof to the land registrar of a land titles division.	4.00
5.	For each attempt to enforce a writ of delivery, writ of sequestration, order for interim recovery of personal property or order for interim preservation of personal property, exclusive of travelling allowances and reasonable and necessary actual disbursements.	76.00
6.	For each attempt to enforce a writ of execution or order, exclusive of travelling allowance and reasonable and necessary actual disbursements.	
	i. where no sale is required or held by the sheriff	31.00
	ii. where a sale is held by the sheriff	44.00
7.	For kilometres necessarily travelled in the county in which the service of a document is effected, or a writ or order is enforced or any other service performed, or an attempt to serve, enforce or perform is made, as set out in Ontario Regulation 283/82 ("Kilometre Allowances").	
8.	On a search for writs, per name searched	3.00
9.	Where a search for writs pursuant to any single requisition results in one or more abstracts, $3.00 per writ listed on the abstract or abstracts, to a maximum of $36.00.	
10.	For preparation of a schedule of distribution under the Creditor's Relief Act, or a calculation for satisfaction of writs and garnishments, per writ or notice of garnishment	5.00
11.	A sheriff who is directed by the court to perform any service or do any act for which no fee is provided is entitled to be paid a travelling allowance and reasonable and actual disbursements, and may be allowed such fee as the court thinks fit, and it shall be payable as the court directs.	

In addition, further fees are set out below for sheriff's officers and process servers:

REGULATION TO AMEND
ONTARIO REGULATION 794/84
MADE UNDER THE
ADMINISTRATION OF JUSTICE ACT
(O.R. 694/87)

1. Paragraph 1 of section 1 of Ontario Regulation 794/84, as remade by section 1 of Ontario Regulation 603/85, is revoked and the following substituted therefor:

1. Sheriff's officers and process servers -

i.	The serving of any writ summons, subpoena, notice, pleading or or other document, for each party served.	$ 5.75
ii.	The enforcement of any court order, where the cost of enforcement is borne by the Crown in right of Ontario, per hour	12.50

2. This Regulation comes into force on the 1st day of January, 1988.

The regulations do not specify amounts which may be charged in respect of general expenses or disbursements which may be incurred in the course of these actions. **The Sheriff's Act** and the Rules of Civil Procedure allow the Sheriff to charge litigants for such other expenses and actual disbursements reasonably and necessarily incurred.

These regulated fee and expense provisions do not apply when litigants approach private sector individuals/companies for process serving. These private individuals may set their own rates for the performance of such services, unregulated by the government.

3. **Background**: Prior to 1968, Sheriffs retained all fees charged and from these fees paid his staff and other operating expenses. The residue of these fees constituted the Sheriff's personal income, subject to the **Public Officer's Fees Act**.

With the proclamation of the **Administration of Justice Act** in 1968, the province assumed full responsibility for the administration and operation of the courts. Concurrent with the proclamation of this **Act**, all office staff of the Sheriff's office were appointed to the public service. The position of Sheriff remained an Order-in-Council appointment and was converted to Crown employee status. Any fees as prescribed by The Regulations to the **Administration of Justice Act** charged by the Sheriff after 1968 are remitted to the Province, in return for set salaries for the Sheriff and his office staff, and payment of all other office operating costs. From **The Sheriffs Act**:

> **14.** The sheriff shall, on or before the 15th day of January in every year, make, to the Inspector of Legal Offices, a return under oath of the aggregate amount of the fees and emoluments received by him, and of his disbursements, during the previous year, up to and including the 31st day of December. R.S.O. 1970, c. 434, s. 14.
>
> **15.** The sheriff shall, quarterly and within twenty days after the expiration of each quarterly period, transmit to the Inspector of Legal Offices a just, true and faithful account, verified upon oath, of all fines, penalties, and forfeitures that he has been required to levy and make by any lawful authority, and of the receipt and application of the same, or the reason why the same have not been received and applied, and he shall pay over to the proper officer or to the person lawfully entitled to receive the same the several sums collected by him, within twenty days next after the period within which the same have been collected. R.S.O. 1970, c. 434, s. 15.

To assist in the process serving and enforcement functions, Sheriffs generally retained individuals on a fee-for-service basis. In 1968, in some locations in the province, these individuals were converted to civil servants. In the balance of the province, such individuals have continued to be retained by Sheriffs on a fee-for-service basis.

4. **Civil Servant Sheriff's Officers:** At the time of their appointment to the Civil Service in 1968, Sheriff's Officers were classified in the Clerk General series. In 1971, new class standards were developed for Sheriff's Officers 1 and 2.

The classification of **Sheriff Officer 1** applies to those officers whose primary function is to act as **process servers**. The classification of **Sheriff's Officer 2** is applicable to officers whose primary function is **enforcement**.

There are currently seven staff classified at the Sheriff Officer 2 level (Sheriff's Officer, Enforcement) in the Sheriff's Office, Judicial District of York. There are no classified staff performing the duties of Sheriff's Officer 1 (Sheriff's Officer, Field Process Server). All work previously performed by the last classified Sheriff's Officer 1 who recently retired is now performed by Fee Officers.

Classified Sheriff's Officers receive a set salary in accordance with their classification for all work done. For income tax purposes, the Ministry issues to classified officers a Form T-4, "Statement of Remuneration Paid".

In the Judicial District of York, classified Sheriff's Officers are provided with Ministry vehicles and are not therefore allowed mileage expenses.

5. **Fee-for-Service - Sheriff's Officers ("Fee Officers"):** The persons named in this application perform solely process work, or a combination of process and enforcement work, as follows:

Baldacchin	- process only
Green	- process only
Jurens, James	- evictions (an enforcement function)
Jurens, Jaxon	- process only
Mitchell	- process only
Muthig	- process only
Usher	- process only

Also employed in this capacity, but not specifically identified by the application is:

Hillier	- process and enforcement.

6. **Remuneration: Fee Officers:**

Enforcement Actions: The tariff of Sheriff's fees established under the Rules of Civil Procedure and Ontario Regulation 609/86 prescribes the fees payable to the Sheriff for various enforcement actions. This tariff also allows the Sheriff to charge for other reasonable expenses and actual disbursements incurred in the performance of those actions. [Set out above]

Regulation 694/87 of the **Administration of Justice Act** sets out the fees payable to Fee Officers for the enforcement of orders where the cost is borne by the Crown. [Set out above]

Fees for fee officers for the performance of enforcement action where the cost is not borne by the Crown are set by the Sheriff locally.

Exhibit 7 - Ontario Regulation 609/86
Exhibit 8 - Ontario Regulation 694/87
Exhibit 9 - Enforcement Fee Schedule established by the Sheriff, Judicial District of York

Schedule of Fees Payable to Fee Sheriff's Officers

Levy, including report - no seizure	$16.00
Seizure of Goods and Chattels (other than motor vehicle)	$16.00/hr
Seizure of Motor Vehicle	$50.00
Arrest	$50.00
Eviction	$21.00
Enforcement, other than above	$16.00/hr.

Note:

Hourly rates in effect MONDAY THROUGH FRIDAY 7:00 A.M. TO 12:00 MIDNIGHT.

MONDAY THROUGH FRIDAY 12:00 MIDNIGHT TO 7:00 a.m., SATURDAY AND SUNDAY 7:00 a.m. to 12:00 MIDNIGHT, $24.00/HR.

SATURDAY AND SUNDAY 12:00 MIDNIGHT to 7:00 a.m. $32.00/hr.

These rates are effective June 1, 19[illegible]3.

Process Serving: Regulation 694/87 also sets out the fees payable to Fee Officer for the service of documents. Fee Officers also receive a kilometric allowance.

In order to receive payment, fee officers submit invoices on a bi-weekly basis setting out the particulars of the process documents served and/or enforcement orders processed. The invoice identifies the kilometric distance travelled in respect of each document/order, the related kilometric expense payment and any other expenses to which the officer is entitled. On the basis of these invoices, which are approved for payment by the Deputy Sheriff or Sheriff, The Sheriff's office bills litigants for the relevant fee and for those kilometric and other applicable expenses which were invoiced by the fee officer. Fee and expense payments received as a result from litigants are deposited into the Sheriffs office revenue account.

Payment to the fee officer occurs via two different types of cheques. The expense portion of their invoice is paid by a cheque issued by the Sheriff from his office revenue account, in the amount equal to expense monies billed to litigants/deposited to the revenue account. Monies remaining in the revenue account (that is, the fee payments) are remitted by the Sheriff to the Treasurer of Ontario. The Sheriff in turn submits the fee officer's approved invoice to the Ministry for payment of the fee amount to which the officer is entitled.

This payment procedure varies in the case of service of documents related to Support and Custody Enforcement matters where the Crown (or Ministry) acts as the litigant. In these cases, the Sheriff does not bill the Ministry as he does other litigants, but rather, the fee officer's invoice is submitted directly to the Ministry for payment. The Ministry issues a cheque directly to the officer in payment of the full amount of this invoice (i.e. both the expense and fee portions), rather than transferring funds from its own accounts to the Sheriffs' office revenue account.

For income tax purposes, the Ministry issues to each fee officer a form T-4A, "Statement of Pension, Retirement, Annuity and Other Income".

7. In the Judicial District of York, the coordination of the functions of enforcement and services of process are the responsibility of the Deputy Sheriff, Enforcement. The classified positions of Sheriff's Officers (Enforcement), Sheriff's Officers (Field Process Server) and the Fee Officers report to the Deputy Sheriff, Enforcement. The Deputy Sheriff reports to the Sheriff who reports for administrative purposes, to the Director, Supreme District Court Services Branch of The Ministry of The Attorney General. This person reports to The Executive Director, Courts Administration, Ministry of the Attorney General.

8. The majority of Fee Officers generally perform those duties outlined in the job specification for Sheriff's Officers 1, with the exception of the maintenance of vehicles and orientation of new Sheriff's Officers.

a. The Class Standard and the Position Specification for the classified Sheriff's Officer 1 are overlapping and provide, in part, as follows:

1) CLASS STANDARD:

CATEGORY: Administrative Services
GROUP: AD-01 General Admin
SERIES: Sheriffs Officer
CLASS CODE: 30600

SHERIFF'S OFFICER 1

This class covers positions of employees who are engaged primarily in serving legal documents pertaining to civil and criminal litigation. They may also perform other functions connected with the Sheriff's Office, such as acting for Sheriff in court sittings, escorting prisoners, assisting with the seizing of property and carrying out of eviction notices, tracing persons who have moved, etc. These employees work on their own most of the time. They receive documents from the Sheriff's Office, determine priorities and time of day for visits, obtain proof of identity where possible, hand documents to the party or drop them at his feet in case of refusal, as well as obtain signatures or photographs where necessary.

In addition to process serving, they keep extensive records of all services, complete and sign affidavits of Service and swear before a Commissioner of Oaths, that service has been effected. They may be required to apprehend persons in the execution of a Sheriff's Warrant and give evidence in Court. They also deal extensively with legal firms and the general public regarding the status of service or to obtain further information on the whereabouts of parties named in documents.

Because of the nature of the work, the serving of documents frequently takes place after normal working hours.

SKILLS AND KNOWLEDGE REQUIRED:

These employees require persistence and patience and need to use considerable discretion and judgement in the performance of their duties. Maturity, stability and perseverance, and the ability to deal effectively with people are essential. Because of the possibility of physical assault they need to be in good physical condition and able to withstand unusual provocation.

January 1, 1971

2) **POSITION SPECIFICATION & CLASS ALLOCATION - CSC 6150**

o o o

INCUMBENT:

1.	Position title: SHERIFF'S OFFICER	Position Code: 02-8310-18	Position Identified: 1
	Supersedes: SHERIFF'S OFFICER (FIELD PROCESS SERVER)	Class title and code: Sheriff's Officer 1 30600	
	Ministry: Attorney General	Division: Courts Administration	
	Branch and Section: Sheriff's Office, Sup. & Dist. Crt. Services	Location: District of York, Toronto	Geog.Loc.Code: 69501
	No. of places: 6	Immediate Supervisor's title: Deputy Sheriff,	Supervisor's position code: 02-8310-06

2. Purpose of position (why does this position exist?)

To effect the personal service of documents pertaining to civil and criminal litigation in an assigned area within the District of York.

3. Duties and related tasks (what is employee required to do, how and why? Indicate percentage of time spent on each duty).

1. As a Process Serving Officer on rotating morning and evening work hours performs such tasks as:
80%

- receiving documents to be served in a designated area; determining priorities;
- effecting service on persons named in document after establishing identity of person to be served;
- obtaining signature of person served in matrimonial causes, actions;
- operating motor vehicle in the course of scheduled or assigned duties;
- maintaining record of all calls (including location, time, mileage reading and results of attendance);
- maintaining the proper care of a vehicle by attending to scheduled maintenance checks and service; reporting same to supervisor;
- maintaining control and care of equipment in car such as tools, camera, handcuffs, first-aid equipment, etc.;
- communicating by telephone with Solicitors in regard to status of service of documents, alternate address, problems in effecting service and in regard to reports or new instructions
- receiving from supervisor new or special assignments;
- communicating with persons to be served and receiving reports or arranging for service.

2. Performs clerical duties relating to Process Serving by:
10%

- supplying information and completing and forwarding particulars to typists for certificate and affidavit preparation;
- preparing more composite report for affidavit for substantial service;
- checking and signing certificate; taking Oath before Commissioner of Oaths or Notary Public when affidavit required.

3. Performs related duties such as:
10%

- acting as Enforcement Officer in receiving and in execution of Writs and Court Orders;
- escorting prisoners to or from penal institutions;
- giving evidence in court as required;
- assisting (under direction of supervisor) with orientation/training of new "Process Server" Sheriff's Officer;
- as assigned.

4. Skills and knowledge required to perform job at full working level. (Indicate mandatory credentials or licenses, if applicable)

General knowledge of the functions of the Sheriff's Office; functional knowledge of the procedures governing Service of Documents; familiarity with legal terminology and documentation; the ability to deal tactfully and effectively with the general public (i.e. defendants in Writs, potentially hostile/volatile situations); valid Ontario Driver's License. Good physical condition.

5. Signature Immediate Supervisor	Date	Ministry Official	Date
		17.03.88	25/03/88

Type Supervisor's name	Type Official's name and title
J. Thayne B. Pitkin	D. Henderson, Dir. Sup. & Dist. Crt. Serv.

6. Class allocation	Class code	Occupational group number	Effective date
Sheriff's Officer 1		30600 GS 6A	25.03.88

I have classified this position in accordance with the Civil Service Commission Classification Standards for the following reason:

A. Primary feature of position is service of legal documents related to civil and criminal litigation.

B. Secondary feature is preparation of documents and reports. Position escorts prisoners, assists with Evictions/Seizures.

C. Position requires: knowledge of relevant procedures, familiarity with legal terminology and documentation, good physical condition.

Signature of authorized evaluator	Date	Type evaluators name
	29.03.88	R.A. Ingram

b. The **Procedure Manual** sets out the duties of the **Sheriff's Fee for Service Officers** as follows at pp 37 - 40:

PROCEDURE MANUAL

ENFORCEMENT AND PROCESS SERVING

DUTIES OF SHERIFF'S FEE FOR SERVICE OFFICERS

General Information:

A Sheriff's Officer is sworn in by the Sheriff to uphold his office and perform the duties of this department. A Sheriff's Fee Officer (Process) is responsible for serving various types of legal documents, using the facilities of the Process Office and his own supplies and transportation. He is paid a fee for each document served, and is reimbursed for his mileage expenses. The Fee Officer invoices the department after the documents are served, or when all avenues of attempted service have been explored.

Office Duties:

The Officer will normally attend the process office Monday, Wednesday and Friday to perform specific office duties.

Fee Officer is responsible for checking the documents when they are received, ensuring that correct number of copies necessary for service are provided and that proper addresses for service are given (this may be either on the document, given in a letter from the solicitor or client, or be shown on Form S-050 (02/82) provided by the Process Office) Exhibit "A"

Fee Officers will attach the Sheriff's Process Officer's Report (Exhibit "B", which is completed at the time of service) to the original documents.

Fee Officers will read, correct and swear to all Affidavits to be returned. The use of the exhibit stamp may be necessary for this.

Fee Officers will read, correct and sign all Certificates to be returned. The use of the certificate stamp may be necessary for this.

It is the Fee Officer's responsibility to ensure that documents he/she is given to serve are returned to the law firms or clients in sufficient time for court dates.

The Fee Officer will organize completed work and compile his/her daily run sheet. This includes separating Process Documents, Crown Subpoenas, Family Court Documents and Ontario Housing Corporation Documents in order to list each separately. He/She will list and provide separate totals for both fees charged and mileage charged by type of document served (Exhibit "C").

Fee Officers must receive and return calls from clients to inform them of the current status of the assignments received. He/She will also receive calls from the residents at the addresses where business cards have been left. At this time, will confirm residence and make appointments for future attempts at service.

At the end of each two week period, the Fee Officers will total all work completed in that time and complete Summary Sheet in order to invoice Process Department for Services rendered and Mileage incurred (Exhibit "D")

The Officer is responsible for checking all documents (copies and originals) to ensure that none have expired. He/She must also check to ensure that copies of all original documents are in his/her tray.

The Officer must be prepared to come to the office at any time to perform any or all of the above office duties.

Preparing for Calls:

After completing office duties the officer will prepare daily run. This may be done in the process office, home or his/her own office.

Check the documents for dates to determine which need immediate attention.

Check addresses and organize work for a run.

Put those documents which should be private in envelopes for service.

Phone people to make appointment for service.

Write up calls, including all information necessary before the time of service, (defendant's name, address, date, type of document(s) to be served, number of document, Officer's badge number and signature) in the Sheriff's Process Officer's Report Book, Form #P4.

Prepare business cards for use at the time of attempted service.

Serving Documents:

Fee for Service Officers provide their own cars and gas, or use other means of transportation of their own choosing.

Fee Officers must be prepared to work Monday to Saturday and at any reasonable time during the day or night.

When the Officer is at the address provided for service he will serve, or attempt to serve the document to the appropriate person and return to his car to complete the Sheriff's Officer's Report Book. Information required includes the time of attempted service, results of the attempt, and the mileage incurred to serve.

Uncompleted Attempts to Serve Documents:

If the document(s) are not served because there was no answer at the address given, the officer will leave his calling card and return at a later date.

If the document(s) cannot be served because the address is incorrect or the person the Officer is attempting to serve cannot be located at the address given, the officer will complete the Process Book with all information obtained. This information will be reported to the client.

Fee Officers are not paid for attempts to serve (either fees or mileage) when service is not completed or until he has confirmed that service cannot be effected at the address given. If an alternative address can be obtained, the officer will be paid the mileage expenses only, and transfer the document to the proper area of the city for further attempts to serve.

Equipment Supplied by Process Office:

- Badge and holder with I.D. picture.
- Billie Stick (for use as a last resort to protect yourself).
- "On Duty Sheriff's Officer" signs to identify your car while working.
- Brief Case.
- Necessary Process Office Supplies.

Equipment Supplied by Officers:

- Car.
- Gas.
- Spotlight.
- Home Office Supplies.
- All other equipment necessary or desirable for performance of duties.

c. The **Procedures Manual** sets out the duties of the **Classified Officers I** at pp.34 - 36.

SHERIFF'S OFFICER (PROCESS SERVING)

PROCEDURES

1. Sheriff's Officer (Process)

   Daily Office Routine: Each officer will attend the office daily. During this attendance, the officer will pick up any work booked out to the officer's area. The officer will compile a summary of the previous day's attendances and submit this summary along with the original of each document that is completed. The summary from each day of the month is then tabulated at month end to form the monthly totals for the officers. Each officer upon arrival at the office will endorse the daily attendance register (AG 939) showing commencement and ending times for each tour of duty.

   During each daily attendance, officers will sign and complete affidavits and certificate of service for documents that have been served or submitted for substitutional service. The officer should proof read the affidavits and certificates and make any corrections needed. The affidavits must be sworn before a Commissioner for Oaths. Any document served or being returned that has been issued from out of the province or country must be sworn under oath before a notary.

2. Process Service of Documents:

   Approximately 80% of a Sheriff's Officer's (process) work load is comprised of serving legal documents. The clerical staff book out the documents to a numbered area, and each officer is responsible for one area of the county. Re-assignments may be necessary if an officer is away or an area becomes back-logged with work.

3. Knowledge of Rules of Civil Procedure for for Service of Documents:

   The aforementioned service of documents is completed according to the rules of civil procedure. It is each officer's responsibility to become fully conversant with the rules. The rules of civil procedure with regard to service of documents are:

A. knowing which documents require personal service and which do not.

B. documents have to be served within a prescribed time limit.

Each officer should be aware of these two basic formats as they comprise the backbone of the rules with regard to service of documents. It should be noted that documents from the various provincial court family divisions, and from out of province and out of the country have their own particular rules of practice, which should be followed whenever possible. It should be noted that a large portion of the officer's work load is from family court.

4. Officer Safety: The documents being served by the officers are generally not welcomed by the members of the business community and the public. Frequently, an officer will find that a rash of verbal abuse and obscenities will follow service of a document. Caution should be exercised so the situation does not escalate to the point of a physical confrontation. An officer should withdraw from this type of situation until such time as back-up officers can be summoned.

5. Form: Each officer should be conversant with the various forms required in performing an officer's duties. They include as follows:

A. AG 939 (the daily attendance register).

B. Sheriff's Process Officer's Report Book.

C. Vehicle daily inspection report sheet.

D. Motor vehicle log book forms.

E. Various affidavits.

F. Certificate forms.

N.B. The aforementioned procedures (#1 to #5) are given as a basic outline of the responsibilities and actions to be taken by a Sheriff's Officer (Process) in the performance of the Officer's tour of duty.

Procedure for Care & Maintenance of Sheriff's Cars & Equipment

1. Sheriff's Department
   Cruiser: Check the Cruiser each day for any visible signs of damage to the exterior or interior, Have oil level checked at least once each week when refueling. Have automatic transmission fluid level checked at least once a month. The cruiser should be washed as required at exterior car exterior car wash locations and at City Hall full service wash approximately once a month. Tickets for City Hall wash are available from the office supervisor. Each cruiser has a vehicle owner's manual, to be checked to determine vehicle service intervals.

2. Motor Vehicle
   Log Book: Each cruiser is assigned a log book. Mileage travelled each day should be entered with the operator signing the log daily. Furthermore, any refueling or maintenance of vehicle should be entered. Also, an entry for passengers in the cruiser should be noted.

3. Equipment: Each officer will have in their care a billy stick, a set of hand-cuffs, a large and small flashlight, and a briefcase. The officer signs these items out of the stock-room. Stationery supplies, batteries, pens, washer fluid, gas-line anti-freeze, etc., may be obtained from the supervisor.

4. Motor Vehicle Accident
   with Cruiser: Obtain the other driver's licence number, insurance ceritificate, and vehicle ownership from the driver's ownership permit, and the serial number of the vehicle. Do not admit any liability and contact police in the event of personal injury or property damage. Report the accident forthwith to the office, and attend at the office to fill out office accident report forms, for office and Ministry of Transport use.

9. Classified Sheriff's Officers utilize the following documents in the performance of their duties:

a) Attorney General 939 - daily attendance register
b) Sheriff's Process Officers Report Book
c) Daily Vehicle Inspection Report Sheet
d) Motor Vehicle Log Book
e) Various affidavits
f) Certificate forms
g) Levy report

Fee-for-Service Sheriff's Officers do not utilize the documents noted in a, c or d. They do use documents b, e, f and g.

10. There are eight Fee-for-Service Sheriff's Officers in the Judicial District of York. Six Fee-for-Service Officers have provided service to the Sheriff's office for over four years.

Fee Officers normally attend the Sheriff's Office on Monday, Wednesday and Friday to receive or return documents. Due to their assigned work area, and its proximity to the court office, two of Fee-for-service Officers attend the Sheriff's Office on a daily basis to return completed work and pick up new work assignments.

Fee-for-Service Sheriff's officers are not compensated for time spent in the office.

Each Fee Officer has an assigned geographic area for process work.

They pick up their work from bins. When there were classified Sheriff's Officer 1 doing process work they also had a geographic area, and picked up much of their work from bins, but would do other duties as assigned by the Deputy Sheriff including enforcement work.

11. Classified Sheriff's Officers 2 are assigned work by their supervisor on a daily basis.

12. Both Fee Officers and classified Sheriff's Officers are sworn in by the Sheriff for the purpose of being a Sheriff's Officer:

In addition, classified Sheriff's Officers, as civil servants, are required to take the Oath of Office and Secrecy and the Oath of Allegiance under the **Public Service Act**:

13. Classified Sheriff's Officers 2 develop much of their background from on-the-job training and experience. Fee Officers are often people with background in process serving and/or enforcement.

14. Fee-for-Service Sheriff's Officers complete the work allocated to them within their own time schedule.

Exhibit 21 lists the Sheriff's Officers who carried out process serving in 1987 and the number of documents served.

PROCESS DOCUMENTS SERVICED

1987

BALDACCHIN, Carmen	3,521	
GREEN, Stephen	4,028	
HILLIER, David	1,585	
JURENS, James	3,325	
JURENS, Jaxon	5,051	
LYTTLE, Thomas - cl. S.Of.I	102	
McCULLOUGH, Phyllis cl. S.Of.I	2,062	
MITCHELL, Paul	3,189	
MUTHIG, Karl	3,912	
USHER, David	6,259	
		33,034
Office	318	
FiFa	30	
Sheriff	358	
		706
		33,740

15. The expectation by the Sheriff's Office is that fee officers will complete their assigned work on a timely basis. Where they are unable to do so (e.g. holiday, illness), a Fee Officer will attempt to arrange coverage among the other Fee Officers. Where this is not possible, the Deputy Sheriff will reallocate work assignments among the Fee Officers.

16. The work of classified Sheriff's Officers is monitored for adherence to specific standards of service i.e. volume and work turnaround time. Classified staff also undergo formal performance appraisals. There is no formal appraisal for fee-for-service sheriff officers, although specific complaints received by the Sheriff regarding performance and completion of service may be discussed with the Officer by the Deputy Sheriff. Excessive complaints in these areas may result in no further assignment of work.

17. Both fee and classified officers in the Judicial District of York are subject to the procedures set out in the **Procedure Manual for Process and Enforcement Work**, which sets out the rules established by the Rules of Civil Procedure for the service of process and the enforcement of Orders.

Exhibit 22	-	Procedure Manual for Process and Enforcement Work, Judicial District of York.
Exhibit 23	-	Rules of Civil Procedure (excerpts)
Exhibit 24	-	Execution Act.

18. Administrative work is completed by the Fee Officers on the premises of the Sheriff's Office, or in their homes. Fee Officers who complete their paperwork at home are eligible for the appropriate income tax deductions for their home offices. Space is provided to the Fee Officers on the premises of the Sheriff's Office. Fee Officers are allowed free access to related Ministry equipment e.g. photocopiers, calculators, etc. Paperwork related to the service of process and enforcement work generated by the Fee Officers is processed by the clerical support staff of the Sheriff's office.

19. Both Fee Officers and classified Sheriff's Officers are provided with equipment to facilitate the performance of their work as well as business cards bearing the Ontario Government logo.

LIST OF EQUIPMENT PROVIDED

TO SHERIFF'S OFFICERS

Civil Servants	Fees
I.D.& Badge	I.D. & Badge
Billie Stick	Billie Stick
Handcuffs	"On Duty Sheriffs Officer" car sign
Uniform	Briefcase
Car	
2-way Radio	
Flashlights	
Briefcases	

The above agreed statement was supplemented by the oral testimony of Mr. David Usher, a fee officer who has provided process serving services to the Sheriff's office for 10 years. Consistent with the facts set out above, Mr. Usher testified that he provides his services in a designated geographic area. He does his paper work in his separately designated area in the office, Monday, Wednesday and Friday, and does not get paid specifically for this time.

Mr. Usher testified that he can perform his work on any days he wants. He noted, though, that the amount of work and hearing dates would dictate the points by which the services must be effected. Mr. Usher further testified that while he is responsible for all of the process serving for his geographic area, he is free to arrange for another fee officer to do his work and vice versa. They regularly do this to cover for

vacations or illness. It is not necessary to have such an arrangement approved by the Sheriff. Mr. Usher indicated that he might typically carry out 100 services in a week and average approximately 75 to 100 kilometres in driving. When one of the fee officers quit, the remaining fee officers decided to divide his geographic area among the fee officers whose geographic areas bordered the officer's who left.

Mr. Usher testified that the reason he goes into the office at specified times, on specified days is to be available for the legal profession to contact him then respecting matters relating to service.

Mr. Usher treats all the money he makes as business income and takes deductions for his office expenses (approximately $10,000 to $15,000 per year) and car. He considers himself to be in business for himself and not an employee of the Sheriff's office or Crown. Mr. Usher testified that he is not restricted in the amount of other work he can do and has done work other than that of a fee officer.

Mr. Usher testified without contradiction that he and the other fee officers each perform their jobs differently. By way of example he said that some have car phones and some have telephone answering services; they all work different hours.

B. PRINCIPLES FOR DISTINGUISHING EMPLOYEES FROM INDEPENDENT CONTRACTORS:

Numerous means of distinguishing employees from independent contractors emerge from the jurisprudence. The main ones are set out below:

1. The Control test;
2. The Fourfold test: a) control; b) ownership of tools; c) chance of profit; and d) risk of loss;
3. The Whose Business Is It test;
4. The Organization test;
5. The Algonquin List.

The details of these various tests were fully canvassed by the Tribunal in its decision concerning the determination of the employee status of the court interpreters and the clerks, bailiffs and staff employed in the Small Claims Court in Ontario: **O.P.S.E.U. and the Crown in the Right of Ontario (Ministry of the Attorney General),** file nos. T/55/84 and T/65/84, decision dated June 24, 1988, and need not be reiterated here.

Some of these tests are overlapping. Often, no single question or test will be determinative. Moreover, in a given context, some questions and/or some tests may not be particularly helpful, one way or the other. The most constructive approach is to consider the relationship in issue from several of the angles highlighted in the tests, whichever seem most applicable to the factual context at hand. This was the approach taken by the Tribunal in **Re Ontario Public Service Employees Union and Ontario Union of Court Reports and The Crown in Right of Ontario (Ministry of the Attorney General), (Re Court Reporters),** file nos. T/64/84 and T/18/86, decision dated September 20,1988; in **Re OPSEU and the Crown in Right of Ontario (Ministry of the Attorney General), (Re clerks, bailiffs and court interpreters),** file nos. T/55/84 and T/65/84, decision dated June 24, 1988, and in **Re CUPE Local 3096 and The Crown in Right of Ontario (North Waterloo Housing Authority - Ministry of Housing), (Re handymen),** file no. T/21/85, decision dated March 20, 1987.

C. SUBMISSIONS OF THE PARTIES:

1. Submissions By The Crown:

Counsel for the Crown maintains that the fee officers are in business for themselves and argues that the fact that they are subject to certain restrictions imposed by the legislation does not transform them into employees of the Crown. Counsel emphasizes that some of the legislative rules govern not only the fee officers (in dispute) and the classified officers (who are uncontested employees) but also the process serving carried out by private sector firms. Counsel relies on the uncontradicted evidence of Mr. Fisher that

the fee officers and the Crown never intended their relationship to be that of employee/employer. He argues that even if the Sheriff is an employee of the Crown, that does not necessarily mean the fee officers are, notwithstanding that they work under the Sheriff's direction.

Counsel maintains that while the purpose of the work of the fee officers may be the same as the purpose of the work of the classified officers I, that being to serve process and documents, the important factor is that the manner in which their respective work is carried out is, in his submission, substantially different. Referring to the normal tests that are used to distinguish employees and independent contractors, counsel argues that the fee officers have not become part of the organization. In addition, he stresses that their work is subject to minimal control, in that their hours are determined by themselves, and that unlike the classified officers, they don't have to devote their full day to work for the Crown. Counsel noted as well that, unlike the classified officers, they do not get paid for their time in the office, they do not sign attendance sheets, they do not have performance appraisals, they are not assigned non process related work in the office, they may have their own offices in their homes, they take business income deductions and they do not work for an hourly rate. Counsel maintains that the fact that the fee officers invoice the Sheriff's office for their pay is more reflective of an independent contractor than an employee.

Counsel for the Crown further stresses that the fee officers themselves divided up at least part of the "geographic pie" which establishes the circumference within which they work, that they can arrange for their own substitutes among the other fee officers and that they own much of their own equipment, in particular their cars. The classified officers, on the other hand, have all their equipment and cars supplied by the Crown.

With respect to entrepreneurial activities, counsel noted the uncontradicted testimony of Mr. Usher that he and other fee officers are not restricted in the amount of other work they can do. He argues that there is no evidence that the fee officers are not free to reject work or that the Sheriff is their only customer. He noted there may be some variation in the fees since not all fees are fixed by regulation. He further observed that the fee officers each negotiated their own mileage rate with the Sheriff based largely on conditions respecting the location of their respective geographic areas.

2. **Submissions By The Union:**

The Union argues that by the application of any of the traditional criteria for distinguishing employees and independent contractors, the fee officers are employees under **C.E.C.B.A.** The Union relies particularly on such factors as the control that is exerted by the Sheriff's office, the Ministry and the Regulations over the work and fees of the fee officers, their lack of entrepreneurial activity, the similarity between much of their work and the work of the classified officers I who are acknowledged to be employees, the substantial amount of work they perform for the Sheriff's office, their long standing relationship with the Sheriff's office and their inability to reject work or to arrange substitutes beyond the existing group of fee officers. The Union maintains that the fee officers are integrated into the Sheriff's office in a manner well beyond that which would be expected of an independent contractor.

D. **DECISION**:

The fee officers fall somewhere between the private sector individuals or companies who do process serving and are clearly independent contractors and the Classified Sheriff Officers I who also perform the process serving function and are agreed by all to be employees within the public service bargaining unit. The circumstances of the fee officers carry some features typical of independent contractors and others which are normally associated with employees. The determining factor, however, is the relationship as a whole and not any single element. We will consider that relationship in accordance with the various tests referred to above which traditionally have been used to distinguish independent contractors from employees: control, ownership of tools, chance of profit, risk of loss, whose business it is, organization and the Algonquin list.

1. **CONTROL:**

a) **Control Over the Manner in Which Work is Performed:**

The fee officers are tightly controlled respecting the manner in which they perform their work. They are not simply advised what work to perform. They are instructed how and when to

submit invoices and are instructed in detail how to prepare for calls. They are told, for example, to check addresses, to organize their work for a run, to phone people to make appointments for service, to put private documents in envelopes, to check that they have the correct number of copies necessary for service and to ensure that no documents have expired. Rather than being told to process affidavits, certificates and documents, they are instructed to "read, correct and swear to all Affidavits" and to "read, correct and sign all Certificates". Moreover, they are instructed that they may need to use a certificate stamp for certificates and that documents must be returned to the law firms in sufficient time for court dates. They are told when to write up calls, when to prepare their business cards as well as where and when and how to prepare the Sheriff's Officer's Report Book. They are told precisely how to deal with the various circumstances causing an inability to effect service, i.e. if the address is incorrect or if there is no answer at an address, and how to attempt to successfully achieve future service. They are advised how and when to keep in touch with clients.

Such detailed instructions concerning how work should be performed as opposed to a more global direction respecting what work is to be done, is substantially more indicative of the ongoing controls that exist in an employment relationship than the independence and discretion over the "hows" of the requested work that would be more typical of an independent contractor.

b) **Control Over When Work is Performed:**

The fee officers are given considerable flexibility in deciding when to serve their documents. The overriding guide is that they must be served in time for the relevant court dates. This kind of discretion over when to perform work is consistent with a typical independent contractor but is not contradictory of employee status. Other aspects of the fee officer's time are less free. They are normally expected to be in the office Mondays, Wednesdays and Fridays to be able to contact and be contacted by clients and to pick up and return work. As well they are instructed that they must be prepared to work Monday through Saturday and at any reasonable time day or night.

c) **Control Over Their Mode of Transportation and Office Location:**

The fee officers are free to determine their own mode of transportation for performing their process serving. They can choose, for example, to use a car, the subway, a bicycle or to walk. The fee officers can also decide whether to set up offices in their homes and perform some of their administrative work there instead of at the sheriff's office. They could further decide to have a car phone and/or a telephone answering service to assist in the performance of their duties. This kind of discretion would be typical of an independent contractor but, again, is not inconsistent with employee status.

2. **OWNERSHIP OF TOOLS:**

The fee officers own some of the "tools" of their work. They supply their own cars and if they want a home office it is supplied by them. On the other hand, the Sheriff's office supplies them with other "tools" such as a brief case, a Billie stick, identification and badge an "On-Duty Sheriffs Officer" car sign and business cards bearing the Ontario Government logo. They are further given office space in the sheriff's office and have the full, free use of Ministry equipment like photocopiers and calculators. Clerical services for the paperwork related to the service of process and enforcement work generated by the fee officers are supplied by the Ministry, and not by the fee officer.

The fact that fee officers own the cars they use to carry out their work is a factor consistent with independent contractor status. On the other hand, it is not inconsistent with employee status. Conversely, the fact that the Ministry supplies numerous essential tools is consistent with employee status but, standing on its own, is not inconsistent with independent contractor status.

In the circumstances of the fee officers the factor of "ownership of tools" is not that indicative of the nature of the relationship, particularly, since the fee officers receive a kilometre allowance for the miles they drive, which offsets the expense of the car as a tool of doing business.

3. **CHANCE OF PROFIT:**

The fee officers are assigned virtually all the process serving work that comes into the Sheriff's office. The full extent of the business that there is in their respective geographic areas comes to them through the Sheriff's office. They cannot generate more business by advertising, by being more efficient in their work or by doing a better job and enhancing their reputations. There is no evidence to suggest that they conduct themselves in any manner that is intended to draw more business to the Sheriff's office and away from private firms that perform process serving. Their business acumen, their ability to determine the needs of the market, their ability to innovate, their willingness to take risks or to make astute investment decisions do not impact on their work and do not create a chance of profit.

There is one isolated instance where some of the fee officers were able to increase their profits. When one of the fee officers quit, the fee officers in the adjoining geographic areas agreed to divide up the newly available geographic area among themselves. This agreement between the affected fee officers and the Sheriff's office is not indicative of a relationship which has as an ongoing element a chance of profit. It was an isolated incident wherein the pie was enlarged for some fee officers. Within the geographic pie, however carved, there is minimal, if any, chance of profit within the control of the fee officers. The fee officer is assured all the work that exists in his or her geographic area and performs it. The manner of the performance of the work, as long as one remains competent, does not impact on the amount of work.

Although the fee officers are paid fees based on the number of services processed, this system of payment, while typical of an independent contractor, is not indicative of such in this instance largely because the fee officer is unable to generate more fees by bringing to himself more services. He simply performs the services assigned and cannot through his actions increase the number of those services.

4. RISK OF LOSS:

The fee officers are subject to minimal risk of loss in their relationship with the Ministry or Sheriff's office. If the fee officers chose to have a home office, they are responsible for supplying it but they are able to perform their jobs without a home office because they have space allotted to them in the sheriff's office. They also have free access to the Ministry's office equipment, are given office space and supplies and utilize the Ministry's clerical services. They do not need, for example, to hire a secretary, to print the forms required in their work, to prepare portfolios to sell their services or to spend money on advertising to attract business, all of which would be typical of an independent contractor. The fee officers do not have to extend themselves in capital outlay in order to have the tools necessary to attract or generate business. They are given the business and are given virtually all that they need in the nature of office support to carry out that work.

The risk of loss that might be associated with their work is further minimized by the fact that they are reimbursed for expenses incurred in the performance of their work. They receive a kilometric allowance, for example, which substantially minimizes the risk of loss that might otherwise be associated with the fact that they supply their own means of transportation.

Mr. Usher testified that he claims an income tax deduction of approximately $10,000 to $15,000 per year for his car and office expense. How much of that is reimbursed was not the subject of testimony. It cannot be concluded on the evidence that it is necessary for Mr. Usher to risk $10,000 to $15,000 a year to earn his fees as a fee officer.

In the circumstances, the Tribunal considers the absence of a chance of profit and the minimal risk of loss for fee officers as strong indicators of an employment relationship instead of that of an independent contractor. The control exercised by the Ministry over the manner in which their work is performed, as discussed above, is a further strong indicator of an employment relationship for the fee officers.

5. **THE RIGHT TO USE SUBSTITUTES:**

In **Algonquin Tavern**, **supra**, the O.L.R.B. commented that it has been considered inconsistent with an employment relationship if one could fulfill the bargain with someone else's labour in place of one's own.

In this situation the fee officers are not generally free to provide their own substitutes if they cannot perform the work themselves. The group of fee officers already at work for the Ministry may and do cover for one another in the case of illness or vacations. The fact that they make these limited substitution decisions themselves and do not involve the Sheriff is not indicative of particular independent discretion because the substitutions are from within the group of people already approved by and doing the work for the Ministry. The fee officers are precluded from finding a substitute outside the group of existing fee officers.

6. **WHETHER THE INDIVIDUAL RENDERS SERVICES OR WORKS UNDER CONDITIONS WHICH ARE SIMILAR TO PERSONS WHO ARE CLEARLY EMPLOYEES:**

In 1968 with the proclamation of the **Administration of Justice Act** in some locations in the province some of the fee officers were converted into civil servants. Those who remained fee officers, at least in The Judicial District of York, perform the same function and essentially the same administrative duties as classified sheriffs officers I who are employees in the bargaining unit. The only duties performed by the classified Sheriff Officers I which are not carried out by the fee officers are the training of new sheriff's officers and the maintenance of vehicles.

Both groups of sheriff's officers report to the Deputy Sheriff who in turn reports to the Sheriff. The conditions under which they work are not uniformly the same: the fee officers supply their own cars and are paid a kilometric allowance; the classified officers are supplied with a car and do not receive a kilometric allowance. Fee officers might perform some of the administrative

tasks in their homes while the classified officers would perform their administrative duties in the office. The fee officers receive fees based on the services of process that have been performed, while the classified officers are paid a salary. Fee officers do not receive specific payment for time spent in the office while classified officers do since they receive a salary. However, the fees based on the services processed may take into account the administrative tasks performed in the office that go into effecting service. The fee officers determine their own hours of work within the framework of time limits set by the existence of court dates etc. The classified officers are also free to determine priorities and times of day for visits. It is understood for both groups that because of the nature of the work, serving documents must frequently take place after normal working hours and must be timed in accordance with court dates. They each perform process work within an assigned geographic area and pick up their work from bins at the office. They are each sworn in by the sheriff.

The identity of the fee officers with the classified officers is not uniform but, at the same time the differences are not particularly dramatic. This factor in the end is not substantially probative one way or the other.

7. **ENTREPRENEURIAL ACTIVITY**:

As stated in **Algonquin Tavern**, entrepreneurial activity is closely associated with chance of profit and risk of loss which have been detailed above. As also noted, the fee officers do not engage in self promotion or advertising. They do not distribute business cards to generate business. They may leave their cards at a location in an effort to make contact with clients or the persons they are seeking to serve. Moreover, although there is some evidence that some of the fee officers have offices in their homes and claim tax deductions, there is no evidence that any one of them has incorporated, as might be typical of an independent contractor.

8. **THE SELLING OF ONE'S SERVICES TO THE MARKET GENERALLY:**

As stated in **Algonquin Tavern**, at p. 1083,

> If the purchasers of an individual's services are numerous and of diverse character, the individual looks more like an independent self employed person than an employee. If, on the other hand, an individual has a long standing and consistent relationship with one or a limited number of purchasers, he is more likely to be considered a 'dependent' contractor or employee - especially if the circumstances or contractual relationship limit his ability to dispose of his skill to other purchasers, or his 'prime customer' is given priority.

The fee officers may perform other work for other purchasers. Unlike the circumstances respecting some of the classes involved in the **Re Court Reporters** case, **supra**, there is no prohibition on their performance of outside work.

Of importance to the assessment of the status of the fee officers, however, there is no evidence to suggest that any of the fee officers performs process serving or enforcement work for any entity other than the Ministry or Sheriff's office. They have essentially one purchaser of the skill they provide to the Sheriff's office. Moreover, the relationship of the fee officers with the Ministry has generally been long standing. Six of eight have provided their services to the Sheriff's office for more than four years. Mr. Usher has done so for 10 years.

The long standing nature of the fee officers' relationship with the Ministry, the exclusivity of it, i.e. the fact that the Ministry is the only customer or purchaser of their process serving/enforcement skills, strongly suggests that the fee officers are employees and not self employed independent contractors.

9. **ECONOMIC MOBILITY OR INDEPENDENCE, INCLUDING THE FREEDOM TO REJECT JOB OPPORTUNITIES OR WORK WHEN ONE WISHES:**

The work of the fee officers is not structured into "job opportunities". They are assigned

the work generated by their designated geographic areas and it is up to them to perform it. The documents that must be served are not "job opportunities". They constitute the ongoing responsibilities of their work for the Sheriff's office. The absence of an ongoing series of job opportunities which they can accept or reject and the presence of a bundle of work which it is their duty to perform is indicative of the status of employee and not independent contractor.

10. **EVIDENCE OF SOME VARIATION IN THE FEES CHARGED FOR THE SERVICES RENDERED:**

Unlike the private sector individuals or companies who engage in process serving, the fee officers are paid fees which are largely set by government regulation. Accordingly, there is no variation in the fees charged by the individual fee officers or among the fee officers as a group. There is some variation in their kilometric allowances but the variation is based on the circumstances persisting in their respective geographic areas and does not reflect individual bargaining power. In contrast, the private sector firms set their own rates for such services.

11. **WHOSE BUSINESS IT IS: Whether the individual can be said to be carrying on an independent business on his own behalf rather than on behalf of the employer or, to put it another way, whether the individual has become an essential element which has been integrated into the operating organization of the employer unit.**

In **Algonquin Tavern** at p.1083, the O.L.R.B. made the following observation respecting integration and the determination of whose business it is:

> Integration in this sense usually presupposes a stable rather than a casual relationship and also involves the nature, importance and 'place' of the services provided in the general operation of the employing unit. The more frequent the re-engagement or longer the duration of the relationship, the more likely the individual will be regarded as part of, or integrated into, the employer's organization.

The fee officers are highly integrated into the Ministry's business of process serving and enforcing orders of the court, which functions have been delegated to the Sheriff. Although the process serving function is not an exclusive responsibility of the Sheriff and at the option of parties to court proceedings may be performed by others, the Sheriff carries responsibility for all the process serving that is referred to the Sheriff's office. There are no classified staff performing the duties of Sheriff Officer I. All the process serving work carried out by the Sheriff's office is done by the fee officers.

The result of this structure is that the fee officers, six of whom do process serving exclusively and two of whom do process serving and enforcement work, are highly integrated into the Sheriff's office. They perform a key ongoing function for which the Sheriff carries responsibility and they utilize extensively the facilities of the Sheriff's office to do so. The extent of their integration is further reflected by their long standing relationship with the Sheriff, the substantial amount of work performed by them for the Ministry and the extent to which the Sheriff and Ministry have regulated and controlled the performance of their duties.

Their extensive integration into the Sheriff's office and the the fact that the Sheriff is the sole purchaser of their services lead directly to the conclusion that the business they perform is not their business of process serving but the Sheriff's business of so doing in the context of the Ministry's business respecting the administration of justice.

On the basis of the forgoing considerations the Tribunal concludes that the fee officers are employees. We are persuaded to this conclusion by the extent of **control** exerted by the Sheriff's office over the manner in which their work is performed, by the minimal presence of **chance of profit** and **risk of loss**, by the **lack of entrepreneurial activity**, by their extensive, **long standing attachment to a single purchaser** and by their **lack of freedom to accept or reject process work** from the Sheriff. They are expected to perform the process work directed by the Sheriff from their respective geographic areas. Their

process serving is not an ongoing series of job opportunities which may be accepted or rejected. Moreover, they **cannot set their own fees** but rather are subject to the fees set by regulation and/or the Sheriff. Fees of the private sector process servers, on the other hand, are unregulated. In addition, the fee officers are **highly integrated into the business** of the Sheriff's office in that they fully perform one of its substantial responsibilities, i.e. process serving, and are provided with services from the Sheriff's office to do so. Finally, the process serving they perform is, in the Tribunal's assessment, **the business of the Sheriff's office** and not the business of the fee officers.

In the result, for the reasons set out above, the Tribunal concludes that the fee officers in the Judicial District of York, as described in the application are employees within the meaning of section 1(f)(f) of **C.E.C.B.A.**

Dated at Toronto this 20th day of December 1989.

Pamela C. Picher - Chair

I concur "J. H. McGivney" - Member

I concur "K. McDonald" - Member

Ontario Public Service Labour Relations Tribunal
Fonction Publique de l'Ontario Tribunal Administratif des Relations du Travail

180 Dundas Street West, Suite 2100, Toronto, Ontario M5G 1Z8 416 598-0688

T/0030/87

Crown Employees Collective Bargaining Act

R.S.O. 1980, c.108

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

Between: OPSEU (S. Silverthorne)

Applicant

and

The Crown in Right of Ontario
(Ministry of Health)

Respondent

Before:

M.G. Mitchnick	Alternate Chairman
W. Walsh	Member
W. Wright	Member

For the Grievor:

B. Hanson
Counsel
Cavalluzzo, Hayes & Lennon
Barristers and Solicitors

B. Linds
Inclusion Officer
Ontario Public Service Employees Union

For the Employer:

P. Jarvis
Counsel
Hicks, Morley, Hamilton, Stewart & Storie
Barristers & Solicitors

M. Milich
Staff Relations Officer
Staff Relations Branch
Human Resources Secretariat

Hearing Date: November 30, 1987

DECISION

This is an application brought by the Ontario Public Service Employees Union pursuant to the provisions of section 40(1) of the Crown Employees Collective Bargaining Act, asking the Tribunal to determine whether Lisa Silverthorne, Supervisor of Clinical Stenographic Services, is an "employee" falling within the scope of the Act. Section 40(1) provides:

> "If, in course of bargaining for a collective agreement or during the period of operation of a collective agreement, a question arises as to whether a person is an employee, the question may be referred to the Tribunal and its decision thereon is final and binding for all purposes."

Certain procedural questions have arisen between the parties, and the parties have agreed to refer these questions to the Tribunal for determination prior to proceeding with the merits. The primary question referred to us is who bears the legal burden of proof in an application under section 40(1), and, related to that, which party, in the absence of agreement, will the Tribunal require to proceed to call its evidence first. The predecessor in the disputed position occupied that position, within the bargaining unit, for some 16 years, and the supplementary question put to the Tribunal is whether, in its view, there is in any event an evidentiary burden to be met by the employer in now seeking to have the Tribunal find that the incumbent in the position is not an "employee".

We note, to begin with, that this power in section 40(1) to determine "employee" status is not a power unique to the Ontario Public Service Labour Relations Tribunal, nor to the Crown Employees Collective Bargaining Act. The experiences and approaches of other administrative tribunals, like the Ontario Labour Relations Board, for example, are therefore worthy of consideration. On the other hand, we agree with the employer that the focus of any labour-relations tribunal must be its governing legislation, and a tribunal must remain sensitive to any idiosyncrasies in drafting which may exist thereunder. As this Tribunal put it in the Walton case, T3/76, decision issued April 6, 1977, at page 6:

> "We do agree that the basis for our decision must be the legislation that we are asked to interpret; however, that does not preclude a consideration as to how other tribunal or boards have considered similar problems where the language or intent of their governing statutes bears some similarity to the legislation that we are called upon to interpret. We do recognize that decisions based on other statutes cannot be determinative of the matters that come before this Tribunal."

The view we take of this matter does in fact stem from the specific way that the scope of the Crown Employees Collective Bargaining Act and the exclusions

therefrom have been drafted. That Act, as the name itself indicates, applies only to "Crown employees". That intention is made express in section 1(1)(f) of the Act, which states in its opening words:

> "1.-(1) In this Act,
>
> ...
>
> (f) "employee" means a Crown employee as defined in the Public Service Act..."

and "Crown employee" is defined in that latter Act as follows:

> "Crown employee" means a person employed in the service of the Crown or any agency of the Crown, but does not include an employee of Ontario Hydro or the Ontario Northland Transportation Commission.

There then follows in section 1(1)(f) a list of persons who, although meeting that definition of "Crown employee", and therefore otherwise falling within the scope of the Act, are nonetheless excluded. Thus the section continues:

> (f) "employee" means a Crown employee as defined in the Public Service Act but does not include,
>
> (i) a member of the Ontario Provincial Police Force,
>
> (ii) an employee of a college of applied arts and technology,

(iii) a person employed in a managerial or confidential capacity,

(iv) a person who is a member of the architectural, dental, engineering, legal or medical profession entitled to practise in Ontario and employed in a professional capacity,

(v) a student employed during the student's regular vacation period or on a co-operative educational training program,

(vi) a person not ordinarily required to work more than one-third of the normal period for persons performing similar work except where the person works on a regular and continuing basis,

(vii) a person engaged under contract in a professional or other special capacity, or for a project of a non-recurring kind, or on a temporary work assignment arranged by the Civil Service Commission in accordance with its program for providing temporary help,

(viii) a person engaged and employed outside Ontario,

(ix) a person employed in the office of the Provincial Auditor, or

(x) a person employed by or under the Tribunal or the Grievance Settlement Board.

As noted in Cross on Evidence, Fifth edition, for example, at page 85, one way of looking at the question of the "burden of proof" is as follows:

> The peculiar duty of him who has the risk of any given proposition on which parties are at issue - who will lose the case if he does not make this proposition out, when all has been said and done ...

Viewing the matter in that way is instructive in the present case, and points toward certain conclusions. To come under the coverage of the Act, the person must, to begin with, be a "Crown employee", as defined under the Public Service Act. That in most cases will not be in dispute, but where it is, it has to be recognized that there is an onus resting on the party asserting that a person is such a Crown employee, to establish that. In other words, if that is in fact an issue in dispute, and no one were to call any evidence, there would be no basis upon which the Tribunal could make even a prima facie finding that the person is covered by this particular piece of collective-bargaining legislation.

On the other hand, once it is agreed or established that the person is in fact a "Crown employee" as defined in the Public Service Act, the Crown Employees Collective Bargaining Act applies, unless it can be shown that the person falls within one of the enumerated exclusions (under section 1(1)(f)). At that point, therefore, the burden of proving that one or another of the exceptions is applicable rests upon the party claiming that the Tribunal ought to be applying that exception. If, for example, no evidence, or

agreed facts, are before the Tribunal beyond those establishing that the person is a "Crown employee" within the meaning of the Public Service Act, then the conclusion the Tribunal will be required to come to is that the person falls within the coverage of the Act. The case of T5/76, a decision issued by the Tribunal on November 24, 1976, and relied upon by the respondent, we do not believe was meant to say anything different. There the only issue in the case was the applicability of section 1(1)(g) [now (f)], subparagraphs (v) and (vi)

> "employee" means a Crown employee as defined in The Public Service Act but does not include ...
>
> (v) a person who is employed on a casual or temporary basis unless he has not been so employed continuously for a period of six months, or more.
>
> (vi) a person engaged under a contract in a professional or other special capacity, or for a project of a non-recurring kind, or on a temporary work assignment arranged by The Civil Service Commission in accordance with its program for providing temporary help.

or, as the Tribunal put it, whether the person in dispute, Sylvia Gordner, was a "temporary" employee. The Tribunal at page 5 stated its conclusion in the following words:

> After assessing the evidence in this case we are not satisfied that the applicant has established that Sylvia Gordner's work assignment is permanent.

However, the Tribunal in that case began by noting with respect to Ms. Gordner that, although her employment had continued for a period of something in excess of two years (the sole point being relied upon by the applicant/Union):

> She was originally employed as a temporary employee in the Temporary Help program. The Temporary Help Program is an activity of the Civil Service Commission which provides Ontario Government Ministries with qualified employees for temporary work assignments. When she applied for a position she signed a temporary employment application and understood that she was not being hired on the permanent staff. She commenced her employment on or about April 1, 1974 and has been working for the Government continuously since that date. During her employment she has been paid not by the Ministry but by the Civil Service Commission on its "Temporary Help Account". She is paid on an hourly basis for time worked and in addition she receives vacation pay at the rate of 4 percent as well as a statutory holiday premium of 4 percent. She receives no other benefits.
>
> When Sylvia Gordner was hired she apparently was advised that because of the budgetary policies there was not a sufficient complement for another full time person although she was told that there was a strong possibility that she would be taken on to the permanent staff. In fairness she was advised of an opening on the full time staff and we infer from her evidence that she was given an opportunity

> to apply for the position. She apparently declined, assuming that her present position would become permanent within a short period of time.

It is apparent from the full decision that what was being reflected in the Tribunal's comment, referred to above, was the reality of where, in that case, the "evidentiary burden" had come to be shifted (for a particularly helpful discussion of the distinction between the different types of burdens and presumptions, see: Lord Denning, Presumptions and Burdens, 61 L.Q.R. 379).

That it is simply the evidentiary burden being discussed becomes even more clear in the words of caution to the employer set out in the remainder of the paragraph. The paragraph in its entirety thus reads:

> After assessing the evidence in this case we are not satisfied that the applicant has established that Sylvia Gordner's work assignment is permanent. The only evidence adduced in support of that position is the length of her work assignment, but, as we have indicated, the effluxion of time by itself is not determinative of the issue.
>
> However we wish to sound a note of caution as to how we propose to proceed in future cases. While we are not satisfied that the time period by itself is sufficient to establish that an individual's employment is of a permanent nature, we feel that in future cases the employer after a temporary assignment has continued for a period of 12 months has some obligation to explain the circumstances surrounding the employment and

> the employer's intentions with respect to a particular assignment in order that the Tribunal may make a proper determination. it will not be sufficient to merely demonstrate that a person has received an assignment through G.O. Temporary. Thus, a work assignment to a position for a period in excess of 12 months coupled with a failure to explain the circumstances surrounding the nature and extent of the assignment may constitute prima facie evidence that the assignment or position is not temporary.

The "evidentiary burden" is, of course, something different from the "legal burden", and will often shift back and forth over the course of a case, depending on the nature of the evidence that the Tribunal at a particular point has in front of it, and the conclusion that that evidence, if unrebutted, appears to support. And it is in that connection that the second question arises in this case, in terms of the effect of evidence that a position now in dispute had been either included in or excluded from the bargaining unit over a substantial period of time, without any apparent problem. In that regard the respondent notes that the Tribunal in T10/76, issued December 23, 1977, observed at page 6

> Second, there is the hard fact that Mr. Williams has been a member of the bargaining unit for some time without any impairment of his functions. In previous test cases before the Tribunal we have scrupulously avoided any discussion or consideration as to whether persons before us under Section 38 were or were not

> members of the bargaining unit, preferring to view such applications as fresh and without any relationship to the past practice of the parties.

As the applicant notes, however, the Ontario Labour Relations Board, in the Corporation of the City of Thunder Bay, for example, [1981] OLRB Rep. August 1121, has had this to say, at para. 7:

> (2) A party which is attempting to alter a status quo which reflected the earlier perceptions of the parties concerning an individual's status, and which has apparently worked adequately for some years must recognize the importance of this historical dimension, and be prepared to adduce clear evidence as to why a change is required to accommodate the interests section 1(3)(b) was designed to protect.

Those comments by the Board, it seems to us, do no more than attempt to reflect what the Board saw as the reality of that type of situation, in terms of what impact a lengthy history of acceptance of one status or the other of a person or position is likely to have upon the adjudicator - in the absence of compelling evidence leading the adjudicator to a conclusion that is to the contrary. We agree with that practical assessment by the Ontario Labour Relations Board, and consider that it would be a useful guide to the public-service community to re-iterate it here. We note, in fact, that the Tribunal in T10/76 itself went on from the statement referred to us by the respondent to add:

> However in this case, bargaining unit involvement has been stressed as going to the root of Mr. Williams' capacity to perform the services required of him and since he has been a member of the bargaining unit there is no need for us to speculate about that central fact. Mr. Williams testified that there has been no suggestion that being represented by a union impairs his function, although he does not advertise his involvement. He indicated that no one has refused to discuss matters with him because he belonged to the union although he might be less effective if it were known he was represented. In truth the evidence indicates that Mr. Williams has not been handicapped in performing his duties as a result of his membership in the bargaining unit although there is a suggestion that he has been discreet about publicizing his involvement. Since there has been no impairment of his function, in these circumstances we are reluctant to exercise our discretion so as to disturb the status quo.

That leaves for determination in this case the final issue of the procedure to be adopted in section 40(1) proceedings before the Tribunal, in terms of the calling of evidence, where there is no agreement between the parties. Obviously the parties themselves will have to consider the extent of any legal burden they will be required to make out, in deciding who it is they intend to have available as witnesses at the hearing. Beyond that, however, we recognize that the Tribunal does not have any collateral form of practice outside the hearing by the Tribunal itself, for the taking of evidence in a section 40(1) application. Other tribunals, such as the Ontario Labour Relations Board, do have

that, and we recognize that the practice of having the Board examiner (or "labour relations officer") assume the responsibility for the initial questioning of the person in dispute, as if that person were "the Board's" witness, eliminates procedural jockeying in the sense that both parties to the proceeding are then left free to cross-examine that person on even terms. That aspect of the procedure appeals to us as being consistent, as the respondent puts it, with the essentially "investigative" nature of the proceeding at that point. Accordingly, the Tribunal is prepared, when the person(s) in dispute is present at the hearing, to begin the evidence by asking that person to come forward to testify, and to assume the responsibility of initiating the question. The witness will then be turned over to the applicant and respondent, in their turn, for additional questioning, which may take the form of cross-examination (bearing in mind that the use of leading questions is nonetheless a matter which can be argued against the "weight" to be given to an answer (cf. Westmount Hospital, [1981] OLRB Rep. May 593, at paragraph 4). When the evidence of the person(s) in dispute is complete, the applicant and respondent will then be afforded the opportunity to call whatever additional witnesses they choose, and will, of course, be subject to the normal rules of evidence with respect to examining one's own witness.

These matters having now been addressed by the Tribunal, the parties are directed to proceed with the application on the "merits".

DATED at Toronto this 20th day of May, 1988.

M. G. Mitchnick - Alternate Chairman

W. Walsh - Member

W. Wright - Member

T/0030/87-2

Ontario Public Service Labour Relations Tribunal
Fonction Publique de l'Ontario Tribunal Administratif des Relations du Travail

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T/0030/87

CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

R.S.O. 1980, c. 108

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

Between:

Ontario Public Service Employees Union
Lisa Silverthorn

Applicant

- and -

The Crown in Right of Ontario
(Ministry of Health)

Respondent

Before:	M.G. Mitchnick	Alternate Chair
	W. Walsh	Member
	W. Wright	Member

For the Applicant:

B. Linds
Inclusion Officer
Ontario Public Service
Employees Union

B.A. Hanson
Counsel
Cavalluzzo, Hayes & Lennon
Barrister & Solicitor

For the Respondent:

M. Milich
Staff Relations Officer
Human Resources Secretariat

P.S. Jarvis
Counsel
Hicks Morley Hamilton
Stewart Storie

Hearing: May 30, 1988

DECISION

This is a referral initiated by the Ontario Public Service Employees Union under section 40(1) of the Crown Employees Collective Bargaining Act. The question referred is whether Lisa Silverthorn is an employee within the meaning of the Act. Ms. Silverthorn is employed in the position of Supervisor, Clinical Stenographic Services reporting to the Director, Clinical Services at the St. Thomas Psychiatric Hospital. In July, 1986, the position of Supervisor, Clinical Stenographic Services was reclassified into the Management Compensation Plan and Ms. Silverthorn was excluded from the bargaining unit. Prior to that date, the position and its incumbent had been in the bargaining unit for a substantial number of years.

It is the submission of the Employer that Ms. Silverthorn, as the Supervisor, Clinical Stenographic Services is employed in a managerial capacity and, therefore, is not an employee within the meaning of the Crown Employees Collective Bargaining Act. The Employer submits that Ms. Silverthorn meets the criteria for exclusion established by the Act under section 1(1)(f)(iii) which states:

> (f) "employee" means a Crown employee as defined in the Public Service Act but does not include,
>
> (iii) a person employed in a managerial or confidential capacity,

and, more specifically, as this term is defined in the Act in section 1(1)(l)(iii) and section 1(1)(l)(iv) which state:

> (l) "person employed in a managerial or confidential capacity" means a person who,
>
> (iii) spends a significant portion of his time in the supervision of employees, [or]
>
> (iv) is required by reason of his duties or responsibilities to deal formally on behalf of the employer with a grievance of an employee.

The position in question is that of a "first-line" supervisor, there being currently three classified and one unclassified word processor, as well as nine Team secretaries, working under Ms. Silverthorn's immediate direction. The word processors are located in the same work area as Ms. Silverthorn, while the Team secretaries are assigned to the area of their Teams throughout the Hospital. All of the normal functions of a group leader or supervisor who is responsible for the flow and output of work from a department are performed by Ms. Silverthorn, including assigning or re-assigning work where problems arise, monitoring attendance and approving short periods of personal absence, scheduling of vacations, participating in hiring for the department, and generally assisting with any difficulties that may arise from either a technical or an intra-hospital-staff relationship point of

view. Ms. Silverthorn may also decide to "pitch in" on a hands-on basis from time to time if and when she feels it appropriate to do so. Care must be taken not to confuse these normal lower-level supervisory or leader responsibilities with the exercise of the kind of independent judgment properly associated with the exercise of "managerial" responsibilities. In addition, the Tribunal in our earlier (interim) decision in this matter issued on May 20, 1988, wrote at page 10:

> As the applicant notes ... the Ontario Labour Relations Board, in the Corporation of the City of Thunder Bay, for example, [1981] OLRB Rep. August 1121, has had this to say, at para. 7:
>
> > (2) A party which is attempting to alter a status quo which reflected the earlier perceptions of the parties concerning an individual's status, and which has apparently worked adequately for some years must recognize the importance of this historical dimension, and be prepared to adduce clear evidence as to why a change is required to accommodate the interests section 1(3)(b) was designed to protect.
>
> Those comments by the Board, it seems to us, do no more than attempt to reflect what the Board saw as the reality of that type of situation, in terms of what impact a lengthy history of acceptance of one status or the other of a person or position is likely to have upon the adjudicator - in the absence of compelling evidence leading the adjudicator to a conclusion that is to the contrary. We agree with that practical assessment by the Ontario Labour Relations Board, and consider that it would be a useful guide to the public-service community to re-iterate it here.

Here, as noted, the employer has only recently taken the position that the nature of the duties exercised by the Supervisor, Clinical Stenographic Services are such as to place her in a conflict-of-interest position vis-a-vis members of the bargaining unit. The explanation for that change in the Hospital's view of the position came from Joy Wendling, the position's immediate supervisor and Director, Clinical Services at the Hospital. Ms. Wendling testified that as of about two years ago, she was asked to perform a dual role at the Hospital, taking on in addition the position of Para-legal Advisor to the Hospital, a position which involves in particular advising the Hospital in connection with and attending at Review Board hearings. She explained that the para-legal responsibilities of the Director's position evolved to the point where it started to become a large part of the Director's job by early 1986. This work now takes up a great deal of the Director's time. Prior to this, Mrs. Wendling was more involved in the running of the section now supervised by Mrs. Silverthorn. She said that when the position was in the bargaining unit, she reviewed all performance appraisals prior to giving them to the employee; evaluated when new equipment was needed; did selection of new equipment and many of the tasks now performed by Mrs. Silverthorn such as verbal and written warnings, vacation scheduling, etc. Now much of her time is spent in her role as Para-legal Advisor and on the

information system, and she does not become involved in those activities because she is either not available, or she does not have the time to be concerned with those details.

The evidence discloses that Ms. Silverthorn has in fact assumed the responsibility for drafting and administering the appraisals for the 12 employees in her department. In the case of the Team secretaries with whom she has only limited physical contact, the evaluation is developed by collating the comments of other persons in the area and reconciling any inconsistencies either amongst those other persons' comments or with her own perception. Ms. Silverthorn and the employee involved then discuss the appraisal (which may then be further altered by Ms. Silverthorn), and it is only after the process is complete that the evaluation is passed to Mrs. Wendling and signed by her. That signature does, therefore, appear to indicate, as Mrs. Wendling testified, only that the department head has read the appraisal, and that it has been done.

Ms. Silverthorn also approves overtime on her own, and has on specific occasions issued verbal warnings without discussing these with Mrs. Wendling (although she may mention the fact to Mrs. Wendling at a supervisors' meeting later). This appears from the evidence to be the only level of discipline normally necessary to be meted out in the operation

of this department, and there is no evidence before us that would suggest the contrary. As the Tribunal noted in Burton (T7/79), for example, at page 5:

> One must be careful in evaluating alleged authority where it is not frequently exercised. In some cases a person does not utilize their alleged authority because it has in reality been eroded by a system that has dispersed it so that others functionally utilize that authority that is alleged to reside in one particular person. In other cases that authority will not be exercised, not as a result of any erosion or dispersion of functions to others, but because operationally the organization runs smoothly and without any real problems but in reality the authority is retained.

Ms. Silverthorn also testified that she has taken the initiative in issuing staff memos of varying kinds to the group under her supervision, and a number of these were filed in evidence. One, for example, provided:

> TO: Team Secretaries and Central Stenographic Service
>
> FROM: Lisa Silverthorn, Supervisor
>
> RE: REST BREAKS
>
> ---
>
> This memo will serve as a reminder that rest breaks are not to exceed fifteen minutes in length (including any travel time) and that there are to be no more than two rest breaks per shift.

Rest breaks are only permitted when your workload allows and should take place in or close to your work area so as to be immediately available for recall to work. These breaks are not accumulative from break to break.

Please be sure to adhere to this policy.

and another:

TO: All Team Secretaries

FROM: Lisa Silverthorn

RE: UPDATING POLICY AND PROCEDURE MANUALS

I am in the process of updating our departmental Policy and Procedure manuals.

I would like all of you to participate in this process in order to make the job procedures less generic and more geared to each specific position, i.e., including morning meetings in Crisis team secretary manual; including referrals and intake in Outpatient team secretary manual; including admitting in Elgin-Norfolk manuals, etc.

Please go through your manual and make any revisions to the existing policies and procedures and also make any additions to your position since the manual was last updated.

I realize that there are no manuals in place for Crisis or Research secretaries and I would appreciate you formulating some type of job procedures for each of those positions.

I would like this to be completed by Friday, December 4 and am asking that you forward your entire manual (except for the binder) to me with your name on it. I will then make the final changes and return your manuals as soon as I have completed them.

Thank you very much.

Ms. Silverthorn testified that she does not recall such memos ever having been issued by her predecessor, and although two long-time members of the bargaining unit were called by the union as witnesses, Ms. Silverthorn's description of how the job has changed in that way was not contradicted.

The employer also relied, it must be recalled, on the exclusion granted under section 1(1)(l)(iv) for a person who:

> "is required by reason of his duties or responsibilities to deal formally on behalf of the employer with a grievance of an employee".

This, at first glance, appears to suggest a rather low test to meet. As the Tribunal commented in Welton (T3/76), at page 12:

> Also, if one looks to the scheme of section 1(1)(m) of CECBA and particularly subsections (i) to (iv) inclusive,, it provides some indication as to the nature of the people that the legislature intended to exclude as being managerial or confidential. At the top of the pyramid are persons such as Ministers of the Crown, judges, deputy heads of ministries and chief executive officers of agencies. At the bottom and covered by subsection (iv) are persons required to deal formally on behalf of the employer with employee grievances. These latter appear to be the first line or front line supervisors who are excluded from the bargaining unit because of the potential conflict of interest which they might have in their duty to the employer if they were to be included in the bargaining unit.

However, applying the subsection too literally would, as Ms. Linds fairly points out, allow the employer to disqualify every first-line supervisor from the bargaining unit simply by plugging them in to some stage of the grievance procedure. It is not clear to us what the Legislature had in mind by the word "formally", but it appears to us that what the subsection requires is that there must be both ostensible and real authority to "deal" with a grievance as part of a formally-constructed grievance procedure. This is consistent with the view expressed on the subsection by the Tribunal in Cairns (T31/81), at page 5:

> In our view, dealing formally requires something more than transmitting documents from an employee to someone higher in authority and vice versa. It presupposes some form of authority on the part of the supervisor or manager to deal or to negotiate the matter with the employee. The supervisor or manager may consult with those higher in order to ascertain policy, but within that framework there ought to be some independent discretion to deal with the employee or the union in order to resolve the differences. If the employer is to rely on that ground to exclude employees, it will have to extend some authority to "deal" to the alleged managerial person.

It does, however, appear to us that Ms. Silverthorn has such authority. It is not surprising to find that the Hospital directed, as the evidence discloses, that all grievances

relating to a particular broad-scale problem, implementation of the new OAG classification system, would go to a single individual in the Human Resource department in order to develop a consistent approach. But Ms. Silverthorn did have an individual grievance come to her from Ms. Wright, the Union President, over the performance appraisal that Ms. Silverthorn had given her. Ms. Wright telephoned Ms. Silverthorn following the appraisal and told her that she was unhappy with the appraisal and was going to grieve. Ms. Silverthorn invited Ms. Wright to discuss it in her office, but at the end of the discussion indicated to Ms. Wright that the offending statements were not going to be removed. Ms. Wright proceeded with her grievance to Step One and she and Ms. Silverthorn again sat down to discuss the evaluation. Following that second discussion Ms. Silverthorn made some amendments to the evaluation, based on Ms. Wright's comments, and on the basis of which she attempted to sign off the grievance on behalf of management. Ms. Silverthorn indicated that she got some advice from Personnel on some of the wording for these amendments, as she had on the earlier version, but there is nothing that would suggest that this was any more than that - advice from a resource area. The matter was not raised with Mrs. Welding, for example, until it reached a higher level of the grievance procedure - at which point Ms. Silverthorn continued to be management's main advisor, as the person who made the

appraisal, up to the point of preparation for arbitration (following which the Hospital decided to withdraw the evaluation rather than litigate it). The subsection, it must be noted though, does not require that an excluded person be the one who ultimately gets to make the decision at the final stage of the grievance procedure. At the earlier stage at which Ms. Silverthorn was formally the representative of the employer, Ms. Wright in her own testimony indicated that it was Ms. Silverthorn with whom she dealt on her grievance at this stage, and that it was Ms. Silverthorn who had responded to the grievance and attempted to settle it.

On all of the evidence, and bearing in mind the explanation given for the alleged change in the responsibilities of the position, and the uncontradicted evidence as to the actual changes which have occurred in practice, we are persuaded that Lisa Silverthorn is not an "employee" for the purposes of the Crown Employees Collective Bargaining Act.

The Tribunal wishes to acknowledge the efforts and co-operation of both parties in the expeditious handling of this matter, including the production, with the assistance of a Tribunal Officer, of an agreed transcript of the evidence, and

we also express our appreciation to both counsel for the quality of their written submissions and casebook.

DATED AT TORONTO THIS 27TH DAY OF JULY, 1989.

M.G. MITCHNICK - ALTERNATE CHAIRPERSON

W. WALSH - MEMBER

W. WRIGHT - MEMBER

Ontario Public Service Labour Relations Tribunal
Fonction Publique de l'Ontario Tribunal Administratif des Relations du Travail

180 Dundas Street West, Suite 2100, Toronto, Ontario M5G 1Z8 416/598-0688

T/0033/87

CROWN EMPLOYEES COLLECTIVE BARGAINING ACT
R.S.O. 1980, c 180

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

Between

P. Del Kriticos

Applicant

And

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

Respondent
Employee
Organization

And

THE CROWN IN RIGHT OF ONTARIO
(Ministry of Health)

Respondent
Employer

Before	J.H. Devlin	Vice-Chairman
	W. Walsh	Member
	R. Drennan	Member
For the Applicant	P. Del Kriticos	In Person
For the Respondent Employee Organization	Nancy Coughlan Grievance Officer Ontario Public Service Employees Union	
For the Respondent Employer	No Appearance	
Hearing	January 22, 1988	

This is an application pursuant to Section 16(2) of the Crown Employees Collective Bargaining Act wherein the Applicant, P. Del Kriticos, seeks exemption from the payment of dues to the Respondent Employee Organization because of his religious convictions.

Mr. Del Kriticos is a member of the Seventh Day Adventist Church and testified that the Church has instructed its members to seek exemption from the payment of Union dues for biblical reasons. Mr. Del Kriticos testified that he is in agreement with the position taken by his Church and that he cannot support any organization which may take action which is contrary to biblical teachings. Mr. Del Kriticos explained that the Seventh Day Adventist Church takes a neutral position as between Labour and Management. If, however, Mr. Del Kriticos were to suffer an injustice at the hands of Management, he testified that, as a matter of religious faith, he would turn the other cheek, as it is for God to redress injustice, if not in this life, then in judgement. Mr. Del Kriticos testified that he believes that the Union would not take a similar view and that, as a result, he cannot support such an organization. If the Union were to take action which was without foundation biblically, Mr. Del Kriticos suggested that he would feel responsible for such action were he required to pay Union dues.

Although Mr. Del Kriticos also made reference to certain developments in the United States and advanced some reasons for seeking exemption from the payment of dues which do not relate directly to the activities of the Ontario Public Service Employees

Union, nevertheless, on balance, we find that there exists the necessary nexus between Mr. Del Kriticos' religious convictions and his objection to the payment of Union dues.

Accordingly, we order that the provisions of the collective agreement pertaining to the payment of dues or contributions to the Respondent Employee Organization do not apply to the Applicant and that henceforth, he shall not be required to pay dues or contributions to the Ontario Public Service Employees Union. By agreement of the Applicant and the Respondent Union, amounts equivalent to such dues or contributions shall be remitted by the Employer to the United Way of Greater Toronto.

The Tribunal retains jurisdiction for purposes of implementing this decision.

DATED AT TORONTO, this 7TH day of MARCH 1988.

Vice Chairman

MEMBER

MEMBER

Ontario Public Service Labour Relations Tribunal
For Publique de l'Ontario Tribunal Administratif des Relations du Travail

180 Dundas Street West, Suite 2100, Toronto, Ontario M5G 1Z8

416/598-0688

Crown Employees Collective Bargaining Act, R.S.O. 1980, c.108

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

T/0038/87

Between: Ontario Public Service Employees Union
Complainant

- and -

The Crown in Right of Ontario
(Ministry of Health)
Respondent

Before: P.C. Picher - Chairperson
J. Sack - Member
R.M. Drennan - Member

For the Complainant: P. Sheppard
Counsel
Sheppard
Barristers and Solicitors

For the Respondnet: M. Quick
Counsel
Legal Services Branch
Ministry of Health

Date of Hearing: February 18, 1988

DECISION

These proceedings are terminated on the basis of the settlement set out below:

MEMORANDUM OF SETTLEMENT

BETWEEN

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

AND

THE CROWN IN RIGHT OF ONTARIO
(Ministry of Health)

RE: T/0038/87 OPSEU and the Crown in Right of Ontario
(Ministry of Health)

The parties hereto agree to the following terms as full and final settlement of the above captioned complaint:

1) The Ministry agrees that Mr. Armen Arkelian will not require grievors to discuss matters that are the subject matter of formally filed grievances outside the grievance process.

2) The Ministry ensures that Mr. Arkelian will cease and desist.

3) The complaintant agrees to withdraw the above captioned Tribunal application under Section 29 of the Crown Employees Collective Bargaining Act.

ON BEHALF OF THE EMPLOYER	ON BEHALF OF THE UNION
"A. Arkelian"	"Faith Roy"
"Brenda Snider"	"Peggy Douglass"
	"Donald M. Stewart"

Dated at Toronto, Ontario this 18th day of February, 1988.

Dated at Toronto, Ontario this 18th day February 1988.

Pamela C. Picher, Chairperson
for the Tribunal

Ontario Public Service Labour Relations Tribunal
Fonction Publique de l'Ontario Tribunal Administratif des Relations du Travail

180 Dundas Street West, Suite 2100, Toronto, Ontario M5G 1Z8 416/598-0688

T/0041/87

Crown Employees Collective Bargaining Act

R.S.O. 1980, c. 108

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

Between: (Ontario Public Service Employees Union)
Complainant

and

The Crown in Right of Ontario
(Ministry of Government Services)
Respondent

Before:

M. Mitchnick	Alternate Chairman
W. Walsh	Member
J. McGivney	Member

For the Grievor:

L. Rothstein
Counsel
Gowling & Henderson

E. MacLean
Staff Representative
Ontario Public Service Employees Union

For the Employer:

B. Bowlby
Counsel
Hicks Morley Hamilton Stewart Storie

S. Shamie
Counsel
Hicks Morley Hamilton Stewart Storie

Hearing: April 18, 1988

DECISION

This is a complaint under section 32 of the Crown Employees Collective Bargaining Act, alleging that the respondent employer and their representatives have contravened sections 29(1), 29(2)(a), and 29(2)(c) of the Act. Those sections provide:

> 29.-(1) No person who is acting on behalf of the employer shall participate in or interfere with the selection, formation or administration of an employee organization or the representation of employees by such an organization, but nothing in this section shall be deemed to derive the employer or any person acting on behalf of the employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.
>
> (2) The employer or any person acting on behalf of the employer shall not,
>
> (a) refuse to employ or to continue to employ or discriminate against a person with regard to employment or any term or condition of employment because the person is exercising any right under this Act or is or is not a member of an employee organization;
>
> ...
>
> (c) seek by intimidation, by threat of dismissal or by any other kind of threat or by the imposition of a pecuniary or any other penalty or by any other means to compel an employee to become or refrain from becoming or to continue or cease to be a member of an employee organization, or to refrain from exercising any other right under this Act.

The employer advances two preliminary objections to the Tribunal proceeding to hear this matter, and it is agreed between the parties that the Tribunal ought to render a written decision on those objections before embarking further. The employer submits:

1) that the complaint fails to make out a *prima facie* violation of the Act; and

2) that in any event the matter or matters in dispute are the subject of the grievance and arbitration procedure, and the Tribunal ought to defer to that procedure, at least until such time as that procedure can be shown to have proven in some way to be inadequate.

We consider it appropriate to limit the extent of our comments on these preliminary submissions, in light of the fact that the matter, in our view, is going to have to proceed before the Tribunal on the merits.

The respondent on its first point cites in particular the "Notes" to the unfair-labour-practice Form of Complaint, as that Form is set out in Reg. 232 to the *Crown Employees Collective Bargaining Act*. The Notes provide:

1. Before a grievor is entitled to relief under section 32 of the Act, it must be established that the respondent has acted contrary to some section of the *Crown Employees Collective Bargaining Act* OTHER

THAN SECTION 32. Where the complaint is made under clause 32(1)(a) of the Act insert in the space indicated the section or sections of the Act the respondent is alleged to have violated.

Where the complaint is made under clause 32(1)(b) of the Act insert in the space indicated "section 36".

Where the complaint is made under clause 32(1)(c) of the Act insert in the space indicated the section or sections of the Act named in clause 32(1)(c) which the respondent is alleged to have violated.

...

3. Paragraph 4 should be completed with care. Each act or omission complained of, together with the section of the Act alleged to have been violated in each instance, shall be specified.

There shall be a concise statement of the material facts, actions and omissions upon which he intends to rely as constituting such improper or irregular conduct, including the time when and the place where the actions or omissions complained of occurred and the names of the persons who engaged in or committed them, but not the evidence by which the material facts, actions or omissions are to be proved, and, where he alleges that the improper or irregular conduct constitutes a violation of any provision of the Act, he shall include a reference to the section or sections of the Act containing such provision.

4. No person shall adduce evidence at the hearing of an application or complaint of any material fact that has not been included in the application or complaint or in any document filed under these Rules in respect of the application or complaint, except with the consent of the Tribunal and, if the Tribunal considers it advisable to give such consent, it may do so upon such terms and conditions as it thinks advisable.

And counsel correctly notes that these directions in large part are a reflection of the Tribunal's requirements set out in section 31 of Regulation 233, which provides:

> 31.-(1) Where a person intends to allege, at the hearing of an application or complaint, improper or irregular conduct by any person, he shall,
>
> (a) include in the application or complaint; or
>
> (b) file a notice of intention that shall contain,
>
> a concise statement of the material facts, actions and omissions upon which he intends to rely as constituting such improper or irregular conduct, including the time when and the place where the actions or omissions complained of occurred and the names of the persons who engaged in or committed them, but not the evidence by which the material facts, actions or omissions are to be proved, and, where he alleges that the improper or irregular conduct constitutes a violation of any provision of the Act, he shall include a reference to the section or sections of the Act containing such provision.
>
> (2) Where, in the opinion of the Tribunal a person has not filed notice of intention promptly upon discovering the alleged improper or irregular conduct, he shall not adduce evidence at the hearing of the application of such facts, except with the consent of the Tribunal and, if the Tribunal considers it advisable to give such consent, it may do so upon such terms and conditions as it considers advisable.
>
> (3) Where a statement in an application or complaint or in any document in respect of the application or complaint is so indefinite or

> incomplete as to hamper any person in the preparation of his case, the Tribunal may, upon the request of the person made promptly upon receipt of the application, complaint or document, direct that the information stated be made specific or complete and, if the person so directed fails to comply with the direction, the Tribunal may strike the statement from the application, complaint or document.
>
> (4) No person shall adduce evidence at the hearing of an application or complaint of any material fact that has not been included in the application or complaint or in any document in respect of the application or complaint, except with the consent of the Tribunal and, if the Tribunal considers it advisable to give such consent, it may do so upon such terms and conditions as it considers advisable.

These requirements are indeed important, not only from the point of view of fairness, but also of expedition. A respondent is entitled to be given a reasonable idea of the case it is called upon to meet before it arrives at the hearing, and, as shown above, is entitled to require in advance particulars of any "indefinite" or "incomplete" allegations to assist it in that regard. The Tribunal, in addition, has a pre-hearing settlement procedure which normally, at the very least, will enhance disclosure and minimize the possibilities for surprise or unproductive days before the Tribunal. When the matter does finally come before the Tribunal, clearly both parties are given the opportunity to amplify their position, both from the point of view of their legal theory of the case, and of their evidence in support thereof. In particular, while the "material facts" on which a complainant relies are to be

set out in advance, it is open to the complainant once appearing before the Tribunal to make of those facts what it can - so long as what it is doing is not, in reality, an attempt to change the "facts" or "incidents" upon which it has indicated it intends to rely.

At the hearing in this case the Tribunal heard a great deal of "amplification" from counsel for the complainant in response to the objections raised by the employer. It was immediately apparent from that elaboration that the allegations setting out the foundation of the complaint were not as explicitly drafted as they might have been. Section 42 of Regulation 233, however, reminds the Tribunal that:

> No proceeding under these Rules is invalid by reason of any defect in form or of any technical irregularity.

With that in mind, we have reviewed the complaint carefully, and are satisfied that, with two exceptions, the statements set out therein do contain the factual basis upon which counsel for the complainant has spelled out her theory of the case.

The complaint's argument with respect to paragraph one of the complaint is that the employer, at the meeting of September 30th identified in the complaint, "threatened" that

if the employees and the Union insisted on there being no departures from the strict terms of the collective agreement, they would not be offered any shift schedules that they would like. While such a statement is open to be construed as a lawful one, it is also open to the Union to attempt to have us conclude, after we have heard all the evidence, that what it really was was a "threat", i.e., a threat that management would exercise the latitude that it did have under the collective agreement to fashion schedules that would "punish" the employees for insisting on adherence to the collective agreement. And the latter, if made out, would seem to be little different from seeking to have a collective agreement enforced through invocation of the grievance and arbitration procedure, and at least "arguably" be a violation of the Act.

That last portion of paragraph one also identifies the "players" on the employee side of the scheduling dispute as being, apart from the staff representative, Mr. Kontor and Mr. Williams. That identification becomes relevant in paragraph three because the complainant's theory of liability in that paragraph is that the employer for the first time departed from its practice of letting a Union representative speak for employees in a discipline-related meeting because of the identity of the two individuals involved, and more specifically because of their pursuance of the shift-scheduling

issue. Quite apart from the question (also raised by the complainant) whether the denial of such representation is itself a breach of the Act, the complainant is entitled to the opportunity to attempt, on the basis of the evidence it can adduce, to make out such a case. The only problem with that theory of the case here is that the complaint fails to make any mention of a key material fact upon which it relies: that there was such a practice of Union representation being permitted in this workplace. We will, however, return to this point subsequently.

The theory of the fourth paragraph of the complaint is that the employer threatened Messrs. Kontor and Smellie with a down-grading if they did not abandon their efforts to be upgraded through their classification grievances. That, certainly, is not the way the employer characterizes the statement of Mr. Pledge, but that, once again, is a matter of the evidence, and conclusions to be argued therefrom. And clearly, once again, if the Union's characterization is made out, an at least "arguable" breach of the Crown Employees Collective Bargaining Act will have been made out.

In sum, the employer's whole theory of the case, as explained to us at the hearing, is that everything that it did with respect to the scheduling and classification changes under

discussion here emanated solely from the audit that had been carried out previously for that operation, and that all of the impugned statements have been completely misrepresented as to their intent. The Union's case, on the other hand, is that the actions complained of all were motivated by a desire to punish employees for, or discourage employees from, pursuing their collective-bargaining rights with respect to scheduling and to their classification, contrary to the sections of the Act enumerated. By allowing the complaint to proceed, we make no judgment about that one way or the other. So long as the minimum outline of a prima facie, or arguable, case has been put before us, if a complainant insists on proceeding, it is the Tribunal's obligation to make its judgment only after the parties have had the opportunity to adduce their evidence.

The only paragraph of the complaint not fitting into this "overview" of the Union's complaint is paragraph two, relating to Mr. Attard. That paragraph complains that that one employee not connected with the ongoing discussions over scheduling and re-classification was told that he would have to transfer to another location in the bargaining unit as a result of his position having become redundant. No nexus is made out between that action of the employer and the exercise of any rights under the Act, nor with the general flow of events set out in the other three paragraphs. Indeed, it may have been

the interpositioning of paragraph 2 which prevented the employer from reading the remaining paragraphs of the complaint as being interconnected. The question of the appropriate application of the redundancy provisions of Article 24 to this transfer is the subject of grievance proceedings, and in our view properly belongs in those proceedings, and not in these proceedings. Paragraph two of the complaint will accordingly not be inquired into.

With respect to the other paragraphs of the complaint, however, we are satisfied, as indicated, that the argument of the complainant has brought those paragraphs within the potential scope of the unfair-labour-practice sections set out in the complaint, and that they do in fact raise fundamentally different issues from those that can or will be addressed through the grievance and arbitration procedures. For that reason we are of the view that deferral to grievance and arbitration would not provide an adequate avenue for addressing the issues that have been raised before us, and that the Tribunal has no option but to accept jurisdiction over these matters on its own (cf., for example, the discussion of the "deferral" policy of the National and Ontario Labour Relations Board in Valdi Inc., [1980] OLRB Rep. Aug. 1254, particularly at paragraphs 6 and 7).

That is not to say that we fail to recognize the p tential for "overlap" between this and the parties' a bitration proceedings - for example, on the question of the proper classification in fact for Messrs. Kontor and Smellie, which the employer obviously will seek to rely on as evidence of its lack of unlawful motive - and the parties may want to address between themselves whether any procedural understanding, sensible from both of their points of view, can be arrived at (including possible settlement of at least individual aspects of the aggregate proceedings).

The final point to consider is whether to permit the complaint to be amended to add reference to the "practice" of permitting Union representation upon which paragraph 3 is argued, at least in the alternative, as well as to statements allegedly made by management at an employee meeting on January 14, 1988. The "practice" point would appear to have been no more than an omission in drafting, and as the "merits" will only begin before the Tribunal some time down the road, we can see no reason to deny that amendment. The January 14th meeting, on the other hand, clearly is an expansion of the complaint, to include a new "incident" occurring after the initial complaint was filed. There is, however, nothing to prevent the Union from filing a separate complaint with respect to that matter, and since the present complaint has yet to be

commenced on the merits, it would seem to make more sense to have all of these matters, which the Union alleges are all part of a continuous course of conduct, dealt with by the parties as one proceeding, either for the purpose of litigation, or of settlement. The amendment will accordingly be allowed.

The Registrar is directed to list this matter for continuation of hearing, in consultation with the parties.

DATED AT TORONTO THIS 12th DAY OF JULY, 1988.

M. G. Mitchnick
Alternate Chairman

W. Walsh
Member

J. McGivney
Member

Ontario Public Service
Labour
Relations
Tribunal

Fonction Publique de l'Ontario
Tribunal Administratif
des Relations
du Travail

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T/0041/87-2

T/0041/87

IN THE MATTER OF AN ARBITRATION

Under

THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

Before

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

Between:

OPSEU (Union Grievance)

Applicant

- and -

The Crown in Right of Ontario
(Ministry of Government Services)

Respondent

Before:

M. Mitchnick	Alternate Chairperson
W. Walsh	Member
J. McGivney	Member

For the Applicant: P. Lukasiewicz
Counsel
Gowling & Henderson
Barristers & Solicitors

For the Respondent: S. Shamie
Counsel
Hicks Morley Hamilton
Stewart Storie
Barristers & Solicitors

Hearing: April 18, 1989
June 14, 1989

DECISION

1. This complaint is withdrawn.

DATED at Toronto, this 15th day of June, 1989.

M. Mitchnick, Alternate Chairperson

W. Walsh, Member

J. McGivney, Member

Ontario Public Service Labour Relations Tribunal
Fonction Publique de l'Ontario Tribunal Administratif des Relations du Travail

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T/0053/87

IN THE MATTER OF AN ARBITRATION

Under

THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

Before

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

Between:	OPSEU	Applicant
	- and -	
	The Crown in the Right of Ontario (Ministry of Labour)	Respondent

Before:	J.H. Devlin	Chairperson
	M. Sullivan	Member
	R.W. Redford	Member

For the Applicant: Timothy Hadwen
Counsel
Cavalluzzo, Hayes & Lennon
Barristers and Solicitors

For the Respondent: R.B. Itenson
Staff Relations Officer
Management Board Cabinet

Eileen Hipfner
Staff Relations Officer
Human Resources Secretariat

Hearings: August 26, 1988
January 5, 1989

In this matter, the Union seeks a declaration pursuant to s.40(1) of the Crown Employees Collective Bargaining Act that persons employed as Occupational Health and Safety Advisors are employees for purposes of the Act. The Ministry concedes that there is no specific exclusion which applies to such persons but requests that the Tribunal find that the Advisors should not be included in the bargaining unit by reason of their duties and responsibilities to the Employer.

At the outset of the hearing, an issue arose between the parties concerning the order of proceeding. Following submissions from both parties, the Tribunal adopted a procedure similar to that outlined in OPSEU (S. Silverthorne) and The Crown in Right of Ontario (Ministry of Health), T/0030/87. There the Tribunal initiated the questioning of persons whose status was in issue after which additional questions of these witnesses were posed by the parties. As noted in Silverthorne, such a procedure is consistent with the investigative nature of a proceeding under s. 40(1) of the Act and also avoids the necessity of any jockeying for position as both parties are free to cross-examine the incumbents.

In this case, there was also a dispute as to which party should follow the Tribunal in its questioning and, as well, which party should be required to proceed first in leading any additional evidence. As the position of Occupational Health and

Safety Advisor existed outside the bargaining unit for some six years prior to the present application, the Tribunal ruled that the Union should proceed first.

The Occupational Health and Safety Advisory Service ("the Advisory Service") was established in 1982 to assist management and unions in the resolution of health and safety issues. Although the Advisory Service originally came within the jurisdiction of the Mediation and Conciliation Branch, in October of 1987, responsibility for the Service was transferred to the Occupational Health and Safety Division. The current Manager of the Advisory Service is Ian Carruthers and reporting to him are five Occupational Health and Safety Advisors.

The role of the Advisory Service is perhaps best described in a pamphlet prepared by the Ministry, the relevant portions of which are as follows:

> "
>
> ...
>
> Introduction
>
> Today's complex economic realities, along with technological advances, call for new efforts by both unions and management to work together to make the most productive use of their skills, knowledge and resources. Many management and union representatives recognize that new approaches are needed to deal objectively and effectively with common problems. Health and safety programs give the parties a unique opportunity to work together to achieve a safe and healthful workplace.

Objectives

The Occupational Health and Safety Advisory Service assists the workplace parties by fostering an atmosphere and attitude conducive to the resolution of health and safety concerns and to self compliance with the Occupational Health and Safety Act.

Occupational Health and Safety Division workplace inspection staff are encouraged to liase with the Advisory Service staff when union/management relations involving health and safety issues are deteriorating.

Changes in attitudes, improved communication and improved co-operation are often observed after the assistance of a third party mediator/adviser has been secured.

Field Operations

How does the adviser operate in the field?

When an adviser is asked to assist in settling a dispute, he or she will usually arrange private exploratory meetings with each of the parties. The issues must be clearly identified and assigned priority. Once the issues have been agreed upon, the adviser arranges a joint meeting. The mediation skills of the adviser help to guide the parties toward resolving their differences and establishing positive joint health and safety objectives. Once the objectives are clear, the parties can jointly proceed to identify the steps that will achieve their objectives.

What Other Types Of Consultative Services Does the Advisory Service Offer?

Requests have been received from workplace parties, both individually and jointly, for assistance in forming joint health and safety committees. The Advisory Service helps employers and workers to develop a broader understanding of their rights and responsibilities under the Act. Such assistance can sometimes avert potentially serious relationship conflicts, which have a negative impact on health and safety.

In the role of neutral third party, the Health and Safety adviser provides expert assistance in the formation or improvement of joint health and safety

committees. Terms of reference for the structure and function of committees are jointly developed and tailored to the workplace. Once terms of reference are agreed upon, committee members usually attend one-day seminars designed to build teamwork, self reliance and harmonious relationships within the group. In addition to labour relations, the committee is exposed to joint training relating to the Occupational Health and Safety Act and designated substances, if required.

Continued assistance is sometimes requested of the adviser by the parties. In these instances, the adviser helps to guide the members towards voluntary compliance or provides assistance in such matters as the development of joint health and safety committee policy statements and worker education programs.

Not all health and safety problems can be resolved by mediation and consultation. Some disputes may require arbitration, such as complaints of reprisal under section 24 of the Occupational Health and Safety Act and matters of a more technical nature that require the involvement of health experts.

The Occupational Health and Safety Advisory Service staff is committed to assisting the parties to meet their common goals. Advisers are ready to provide counsel and assistance to workers, the union-management community and to the Occupational Health and Safety Division staff.

..."

The position description for the Occupational Health and Safety Advisor which was acknowledged to be a fair summary of the duties and responsibilities performed by Advisors is as follows:

Purpose of Position (Why does position exist?)

To intervene in, and mediate disputes in the Labour Relations/Health and Safety field where the administration of the Occupational Health and Safety Act alone, will not bring about the mutual understanding and cooperation between the parties. To engage in preventative mediation/relationship improvement program, by working together with

Labour/Management and Joint Health and Safety Committees, and to provide educational program guidance in both the technical and legal aspects of the Occupational Health and Safety Act and Labour Relations Act.

Statement of Major Responsibilities (How is purpose achieved?)

Mediates complex Health and Safety disputes where previous enforcement efforts have failed or where enforcement is not appropriate by:

1. Assesses the feasibility of entering into discussions and ways of maximizing the chances of settling the dispute. Meets with the parties to clarify and priorize the issues, broaden areas of agreement and narrow areas of disagreement. Organizes and determines the strategy to use in order to enhance the possibility of settlement. Drafts proposals for settlement and prepares reports, briefs, etc. for Ministry executives.
2. Acts as a consultant to the parties to promote harmonious relationships and assist in the formation of, and the activities of Labour/Management Joint Health and Safety Committees. Develops formal guideline agreements for the structure and terms of reference of committees to suit the particular size and nature of the business or organization. Assists the employer/union and Joint Health and Safety Committees to develop joint policies in regard to Health and Safety programs and encourages the development of various safe work practice procedures. Develops, arranges and conducts joint training seminars in regard to relationship improvement and Health and Safety subjects i.e. Legislation, Workplace Audits, accident investigation, case studies, etc.
3. Liaises with safety associations, community colleagues (sic), universities and labour organizations to promote a common approach to Occupational Health and Safety in the workplace. Liaises with officials in the Ontario Labour Relations Board, Conciliation and Mediation Services and Office of Arbitration in order to gain a better overall understanding of mutual responsibilities, to exchange information and obtain advice.
4. Sits as a member of various Occupational Health and Safety Division committees to provide guidance and knowledge of labour relations, etc.
5. Provides guidance and training to health and safety inspectors on the techniques of conflict resolution and the role of labour relations in Occupational Health and Safety. Trains junior advisors within the unit.
6. Prepares responses to a variety of case

correspondence for the Minister, and Occupational Health and Safety Division executives. Prepares briefs on cases for the attention of the Minister, Deputy Minister and Occupational Health and Safety Division executives.

Compensation Factors (Describe)

Knowledge

Advanced knowledge of the Occupational Health and Safety Act, and familiarity with its administration and its regulations. Thorough knowledge of the collective bargaining process, with a familiarity of the entire industrial relations field including the structure and character of employee/employer organizations. Knowledge of the Labour Relations Act, its practices and procedures. Extensive experience in health and safety acquired through senior positions in management or in a union, supported by formal education in health and safety, labour relations, engineering, or science in order to be able to develop innovative techniques to fit complex situations and to promote a healthy and safe workplace. Knowledge of the industrial processes and machinery in order to conduct educational seminars, workplace audits, accident investigations, practice accident prevention, etc. Highly developed interpersonal and administrative skills to deal with senior management and union officials in creating a positive atmosphere for the achievement of settlements.

Judgement

All work is performed with a high degree of independence, and with no direct supervision. The manager is available for advice, but only after meeting with the parties and usually only by telephone. As a result, a great deal of judgement is required to be able to assess complex human relations, and health and safety problem areas, in terms of determining what the issues are, why do they exist, how should they be addressed, and what action should be taken. Judgement is also exercised in maintaining the respect and confidence of the parties, in using existing and/or innovative approaches to bring about a settlement, and in promoting a harmonious relationship between the parties.

Accountability

Program: Identifies problems areas and takes the appropriate course of action to avert or bring about a resolution of issues/problems, to the mutual

satisfaction of the parties. The incumbent is also responsible for promoting, developing and conducting joint training programs often in tense situations. In addition, the incumbent is required to act as a consultant to appraise existing employer Health and Safety Programs and to determine/provide advice as to what improvements are required with respect to the provisions of the Occupational Health and Safety Act. Failure to effectively carry out assigned responsibilities would cause a further erosion of employer/employee relations and lead to increased confusion, misunderstanding and industrial conflict, possibly creating adverse political and media coverage for the Branch and the Ministry.

Contacts

Internal: Regular contact with senior officials of the Ministry to discuss contentious cases, progress, etc. Contact with Occupational Health and Safety Division field management staff to provide counsel and advice where required.

External: Regular contact with senior representatives of management and unions, and with lawyers practising in the industrial relations field. Usually this contact is made in a "crisis atmosphere" and is an attempt to discuss and mediate issues.

Dan Sweezy has worked as an Occupational Health and Safety Advisor since September of 1987 and testified that referrals to the Advisory service are typically made by management, by union representatives or by the Ministry of Labour. The referral is initially made to Mr. Carruthers who then assigns the case to one of the five Advisors.

Mr. Sweezy testified that when he is assigned a case, he contacts the parties and first arranges to meet with each party separately. At the initial meeting, Mr. Sweezy indicates that he is there to provide assistance and that he is a neutral third party who does not represent the interests of either

management or the union. Mr. Sweezy testified that after the first meeting, he attempts to develop strategy to resolve the dispute and to foster an internal system of responsibility whereby representatives of management and the union will work together toward a common goal. As an Occupational Health and Safety Advisor, Mr. Sweezy has no enforcement power and described his role as that of a mediator. If Mr. Sweezy cannot resolve a dispute to the parties' satisfaction, he agreed that the parties must then pursue their legal remedies. He testified, however, that he has not yet come across a case which he could not resolve, at least to some degree.

Mr. Sweezy provided the Tribunal with examples of a number of cases in which he has been involved and both he and Mr. Carruthers testified that in many instances, there is an interplay between labour relations and health and safety issues. Frequently, an Occupational Health and Safety Advisor will be confronted with labour relations issues which must be addressed and resolved before the Advisor can effectively deal with health and safety matters.

In excess of 50% of the cases assigned to Mr. Sweezy have involved more than one union and of these, approximately 70% have involved the Ontario Public Service Employees Union. Mr. Sweezy testified that multi-union disputes frequently centre around the composition of the health and safety committee or participation in educational programs. Mr. Sweezy expressed the

view that his membership in the applicant Union would be of concern to other unions as well as to management. He also suggested that union membership would impair his ability to perform his job and would put him in a position of potential conflict of interest. Mr. Sweezy testified that in one case to which he was assigned, he was asked by a member of management if he belonged to a union and when he replied that he did not, the individual indicated that he felt comfortable dealing with him.

Mr. Sweezy's view of the effect of union membership was also shared by Bryan Powers, another Occupational Health and Safety Advisor. In approximately 20% of the cases to which Mr. Powers has been assigned, he has been asked by the parties if he is a union member and, in one instance, he was even asked to provide proof that he was not. Mr. Powers testified that it is essential to the dispute resolution process that Advisors be perceived as neutral and he expressed the view that union membership would affect his ability to perform his job. At the same time, Mr. Powers testified that he would maintain his neutrality regardless of the outcome of this application.

Mr. Carruthers also stressed the importance of neutrality on the part of Occupational Health and Safety Advisors and testified that this has been recognized by the applicant. In this regard, Mr. Carruthers pointed to a letter which he received from Bob DeMatteo, the Union's Health and Safety Co-ordinator, referring to the valuable role of the Advisor as a "neutral third party in resolving disputes".

Apart from the evidence of members of the Advisory Service, the Union called a number of witnesses who also play a role in health and safety matters. The first of these witnesses was Theodore Tomayer, a Labour Affairs Officer with Labour Canada. Mr. Tomayer is responsible for the administration of a number of sections of the Canada Labour Code including Part IV which deals with Occupational Health and Safety. Approximately 70% of Mr. Tomayer's time is spent on health and safety issues and Mr. Tomayer acts in the role of both an Inspector and an Advisor. Mr. Tomayer testified that approximately 80% of the disputes in which he is involved are resolved without the need of enforcement procedures.

Mr. Tomayer is a member of the Public Service Alliance of Canada and in his eight years as a Labour Affairs Officer, he testified that the issue of his union membership has been raised only five or six times. On these occasions, Mr. Tomayer has advised the parties that he has been assigned to inspect or to resolve a dispute and not to discuss his union affiliation. Mr. Tomayer testified that he deals with a number of unions including the Public Service Alliance and that union membership has not impaired his ability to perform his job. Mr. Tomayer agreed, however, that parties are compelled to deal with him and that the service he provides is not entirely voluntary.

Also called by the Union was Keith Rothney who has been employed by the Ministry of Labour for nine years. Mr. Rothney has worked as an Inspector in the Mining Branch and, more recently, in the Industrial Branch. For a period of ten months in 1988, Mr. Rothney was seconded to the training section of the Ministry where he was assigned to train new Inspectors. Mr. Rothney testified that Inspectors often work together with Occupational Health and Safety Advisors and that, like Advisors, Inspectors are frequently involved in mediation and are also responsible for promoting internal systems of responsibility. Mr. Rothney is a member of the Ontario Public Service Employees Union and testified that his union affiliation has never been put in issue and has not affected the performance of his job duties.

Joseph Divitt is a National Health and Safety Representative for the Canadian Union of Public Employees. He services some 600 public sector locals in Ontario and in so doing, he regularly deals with Occupational Health and Safety Advisors. Although many cases involve multi-union disputes, Mr. Divitt testified that it would make no difference to him if the Advisors were to be represented by the applicant Union. To Mr. Divitt's knowledge, no issue has ever been raised concerning the union affiliation of an Inspector or an Advisor.

The issue, then, is whether persons employed as Occupational Health and Safety Advisors are employees for purposes of the Crown Employees Collective Bargaining Act and in addressing this issue, the following sections of the Act are relevant:

"1.-(1) In this Act,

...

(f) "employee" means a Crown Employee as defined in the Public Service Act but does not include,

...

(iii) a person employed in a managerial or confidential capacity,

...

(l) "person employed in a managerial or confidential capacity" means a person who,

(i) is employed in a position confidential to the Lieutenant Governor, a Minister of the Crown, a judge of a provincial court, the deputy head of a ministry of the Government of Ontario or the chief executive officer of any agency of the Crown,

(ii) is involved in the formulation of organization objectives and policy in relation to the development and administration of programs of the Government or an agency of the Crown or in the formulation of budgets of the Government or an agency of the Crown,

(iii) spends a significant portion of his time in the supervision of employees,

(iv) is required by reason of his duties or responsibilities to deal formally on behalf of the employer with a grievance of an employee,

(v) adjudicates or determines claims for compensation which are made pursuant to the provisions of any statute,

(vi) is employed in a position confidential to any person described in subclause (i), (ii), (iii), (iv) or (v),

(vii) is employed in a confidential capacity in matters relating to employee relations including a person employed in a clerical, stenographic or secretarial position in the Civil Service Commission or in a personnel office in a ministry or agency of the Government of Ontario, or

(viii) is not otherwise described in subclauses (i) to (vii) but who in the opinion of the Tribunal should not be included in a bargaining unit by reason of his duties and responsibilities to the employer;

..."

It was the submission of Mr. Hadwen, on behalf of the Union, that the legal burden rests with the Ministry to demonstrate that Occupational Health and Safety Advisors come within one of the exclusions to the definition of "employee" contained in the Crown Employees Collective Bargaining Act: OPSEU (S. Silverthorne) and The Crown in Right of Ontario (Ministry of Health), (supra). Mr. Hadwen further contended that where, as here, the Ministry relies upon the omnibus clause which is contained in Section 1.-(1)(1)(viii) of the Act, the Ministry must demonstrate that some real conflict of interest would arise were Occupational Health and Safety Advisors to be represented by the Union. In this case, it was submitted that there was no direct evidence to support such a conclusion and that, on the contrary, the only direct evidence indicates that union

membership would not impair the ability of Advisors to perform their duties. Mr. Hadwen further cautioned the Tribunal against endorsing a perception that the neutrality of Advisors would be compromised if they were to be represented by the Union for purposes of their own employment relationship with the Ministry.

Although Mr. Hadwen acknowledged that as a general rule, an evidentiary onus rests with the party seeking to alter the status quo, he submitted that, for two reasons, the previous exclusion of Occupational Health and Safety Advisors should have no bearing upon the present application. Firstly, Mr. Hadwen suggested that the fact that Advisors have functioned outside the bargaining unit does not indicate that they could not perform their duties just as effectively as members of the bargaining unit. Secondly, Mr. Hadwen submitted that there was no evidence of any agreement between the parties that the exclusion of the Advisors was appropriate and, in fact, there was no evidence that any person within the Union who was responsible for such matters was even aware of the exclusion prior to the filing of the present application. In all the circumstances, Mr. Hadwen requested that we allow the application and in the event that membership in the bargaining unit were to result in some real conflict of interest in the future, Mr. Hadwen suggested the matter could be reconsidered by the Tribunal at that time.

Ms. Hipfner, on behalf of the Ministry, conceded that the ultimate legal burden rests with the Employer to demonstrate that Occupational Health and Safety Advisors are not employees for purposes of the Crown Employees Collective Bargaining Act. She submitted, however, that the omnibus clause should be broadly construed as it gives to the Tribunal a wide discretion to determine whether persons should be excluded from collective bargaining under the Act. Ms. Hipfner further contended that the Employer need not establish an actual conflict of interest by virtue of union membership but only that there exists the real potential for such a conflict if the Advisors were to be included in the bargaining unit.

Ms. Hipfner pointed out that Occupational Health and Safety Advisors are engaged primarily in mediation and in the course of their duties, they are often called upon to resolve labour relations issues which extend beyond matters of health and safety. Ms. Hipfner contended that the importance of third party neutrality is recognized as vital in the field of labour relations and that such neutrality must be both real and perceived. Union membership on the part of the Advisors would, it was submitted, be seen to detract from such neutrality and would inhibit the ability of the Advisors to gain the necessary trust and confidence of the parties. Ms. Hipfner further contended that as union members, Advisors would be in a position to run for union office and to promote the health and safety agenda of the applicant which would be incompatible with their

duties and responsibilities to the Employer. Finally, Ms. Hipfner requested that we take into account the fact that Advisors have, for some time, been excluded from the bargaining unit and in the absence of any compelling reason to alter the status quo, she requested that we dismiss the Union's application.

As the parties are in agreement that Occupational Health and Safety Advisors are Crown employees as defined in the Public Service Act, there is no dispute that the burden rests with the Ministry to demonstrate that the omnibus clause applies so as to exclude Advisors from the definition of "employee" under the Crown Employees Collective Bargaining Act. There is, however, an issue between the parties with regard to what must be established in order for the Tribunal to conclude that Occupational Health and Safety Advisors should not be included in the bargaining unit. There is also disagreement between the parties concerning the effect of the Advisors' exclusion from the unit for some time prior to the present application.

Dealing firstly with scope of the omnibus clause, it has been said that this provision gives to the Tribunal a wide discretion to determine whether a person should be included in the bargaining unit: The Crown in Right of Ontario and the Ontario Public Service Employees Union 10/76. At the same time, the omnibus clause is not a separate ground of exclusion under the Act but is contained within the exclusion for persons

employed in a managerial or confidential capacity. This exclusion sets out certain specific duties and responsibilities which are incompatible with membership in the bargaining unit and, in order for the omnibus clause to apply, similar or comparable incompatibility must exist. The Tribunal should be no less rigorous in the application of the omnibus clause than in the application of any of the specific exclusions to the definition of "employee" contained in the Act.

In this case, it is said that a conflict of interest would result if Occupational Health and Safety Advisors were to be included in the bargaining unit. While we agree that this could properly give rise to the application of the omnibus clause, nevertheless, it must be demonstrated that there exists the real likelihood of such a conflict.

Prior to considering the nature of the duties and responsibilities of Occupational Health and Safety Advisors, it is appropriate to address the effect of the status quo or, in other words, the fact that for some years prior to the present application, Advisors were excluded from the bargaining unit. As pointed out by Mr. Hadwen, in OPSEU (S. Silverthorne) and the Crown in Right of Ontario (Ministry of Health), (supra), the Tribunal found that there was an evidentiary onus on the party seeking to alter the status quo. The Tribunal commented as follows:

> As the applicant notes, however, the Ontario Labour Relations Board, in the Corporation of the City of Thunder Bay, for example, [1981] OLRB Rep. August 1121, has had this to say, at para. 7:
>
> > (2) A party who is attempting to alter a status quo which reflected the earlier perceptions of the parties concerning an individual's status, and which has apparently worked adequately for some years must recognize the importance of this historical dimension, and be prepared to adduce clear evidence as to why a change is required to accommodate the interests section 1(3)(b) was designed to protect.
>
> Those comments by the Board, it seems to us, do no more than attempt to reflect what the Board saw as the reality of that type of situation, in terms of what impact a lengthy history of acceptance of one status or the other of a person or position is likely to have upon the adjudicator - in the absence of compelling evidence leading the adjudicator to a conclusion to the contrary. We agree with that practical assessment by the Ontario Labour Relations Board, and consider that it would be a useful guide to the public-service community to reiterate it here.

From the remarks of both the Tribunal and the Ontario Labour Relations Board, it is apparent that the status quo is significant to the extent it reflects some shared understanding concerning the status of the persons in issue.

In this case, Ms. Hipfner contended that the Union both had knowledge of and acquiesced in the previous exclusion of Occupational Health and Safety Advisors from the bargaining unit. In support of this position, Ms. Hipfner relied upon the letter from Mr. DeMatteo to Mr. Carruthers. This letter, however, simply refers to the Advisors being neutral third parties but does not address their status. The bargaining unit is a large

one and we must agree with Mr. Hadwen that there was no evidence of knowledge on the part of the Union of the exclusion of Occupational Health and Safety Advisors prior to the launching of the present application. The status quo, therefore, is of no particular assistance and, in the circumstances of this case, we do not find there to be an evidentiary onus upon the Union to demonstrate why a change in the status quo is required.

It is necessary then to consider the nature of the duties and responsibilities performed by Occupational Health and Safety Advisors. It is clear from both the position description and the oral evidence that Advisors are involved primarily in mediation and in the course of dealing with health and safety issues, they are frequently called upon to assist in the resolution of broader labour relations disputes. The service provided by the Advisors is a voluntary one and the ability of the Advisors to gain the trust and confidence of the parties is essential to the effective performance of their job duties.

In the labour relations field, mediation services are commonly provided by third party neutrals and it is generally recognized that it would be inappropriate for such individuals to be affiliated with either labour or management. Although such an affiliation may not, in fact, compromise neutrality, it could be seen to have this effect and thereby impair the confidence of the parties in the service being provided. In our view, persons employed as Occupational Health and Safety Advisors are

in no different position and we are of the opinion that they should not be included in the bargaining unit by reason of their duties and responsibilities to the Employer.

There is, we find, a distinction to be drawn between the duties performed by Occupational Health and Safety Advisors and those of an Inspector, such as Mr. Rothney, or a Labour Affairs Officer such as Mr. Tomayer. Although Mr. Tomayer performs functions similar to that of an Advisor, he too is an Inspector and, in this capacity, his intervention is mandated by legislation and he exercises certain powers of enforcement. Advisors, on the other hand, have no such powers and the service which they provide is voluntary. Although the evidence suggests that Inspectors and Labour Affairs Officers can effectively perform their duties while maintaining union membership, this application concerns the status of persons employed as Occupational Health and Safety Advisors. In respect of these persons, we are of the view that union membership is incompatible with their duties and responsibilities to the Employer. The Tribunal, therefore, finds this an appropriate case in which to apply the omnibus clause with the result that persons employed as Occupational Health and Safety Advisors are not employees for

purposes of the Crown Employees Collective Bargaining Act.

DATED AT TORONTO this 8th day of May , 1989.

J.H. Devlin, Vice-Chairperson

M. Sullivan, Member

R.W. Redford, Member

Ontario Public Service Labour Relations Tribunal
Fonction Publique de l'Ontario Tribunal Administratif des Relations du Travail

180 Dundas Street West, Suite 2100, Toronto, Ontario M5G 1Z8 416/598-0688

Crown Employees Collective Bargaining Act

R.S.O. 1980, c.108

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

T/0060/87

Between:

Akbar Maghsoudi

Complainant

and

Ontario Public Service Employees Union

Respondent

and

T/0061/87

Between:

Akbar Maghsoudi

Complainant

and

The Crown in Right of Ontario
(Ministry of Transportation)

Respondent

Before:	J.H. Devlin	Vice-Chairperson
	M.J. Sullivan	Member
	J.H. McGivney	Member
For the Complainant:	Akbar Maghsoudi, in person	
For the Respondent Union:	D. Wright Counsel Gowling and Henderson Barristers and Solicitors	
For the Respondent Ministry:	W. Kenny Counsel Hicks Morley Hamilton Stewart Storie Barristers and Solicitors	
Hearing:	September 19, 1988	

There are two complaints before the Tribunal, both of which were filed by Akbar Maghsoudi in February of 1988.

Maghsoudi is employed as a Senior Research Technician and the essence of his Complaint against the Ministry is one of discrimination. Both in the written Complaint and at the hearing, Mr. Maghsoudi indicated that he was alleging a breach of Section 37(1) of the Crown Employees Collective Bargaining Act which is to the following effect:

> "
>
> ...
>
> 37.-- (1) The employer or any person acting on behalf of the employer shall not,
>
> (a) refuse to employ or continue to employ a person;
>
> (b) threaten dismissal or otherwise threaten a person;
>
> (c) discriminate against a person in regard to employment or a term or condition of employment; or
>
> (d) intimidate or coerce or impose a pecuniary or other penalty on a person,
>
> because of a belief that he may testify in a proceeding under this Act or because he has made or is about to make a disclosure that may be required of him in a proceeding under this Act or because he has made an application or filed a complaint under this Act or because he has participated or is about to participate in a proceeding under this Act.
>
> ..."

In his Complaint against the Ministry, Mr. Maghsoudi outlines a series of events which he alleges reflect a pattern of discrimination and unequal treatment and he identifies Mr. P. Smith, the Director of the Research and Development Branch of the Ministry as "the mastermind of practically all discriminatory initiatives" against him. Mr. Maghsoudi also identifies a number of other members of management who, he says, conspired and plotted against him. According to Mr. Maghsoudi, the discriminatory treatment has taken a variety of forms. He says that management has undermined his accomplishments, curtailed his legitimate rights and failed to recognize his achievements. In particular, it is alleged that other employees have been given credit for work actually performed by Mr. Maghsoudi; that, on occasion, Mr. Maghsoudi's work has been assigned to others and that the Ministry has failed to make adequate use of Mr. Maghsoudi's demonstrated skill and ability. Mr. Maghsoudi also says that, on various occasions, he has been improperly transferred, unjustifiably declared surplus and demoted to allow for the advancement of other Technicians favoured by management. In addition, Mr. Maghsoudi contends that, at one time, he was improperly denied educational assistance. Mr. Maghsoudi says that management has engaged in a concerted effort to hamper and undermine his career development and that as a result of the Ministry's treatment, he virtually suffered a nervous breakdown. By way of relief, Mr. Maghsoudi requests that those responsible for the discriminatory treatment against him be brought before the Tribunal and disciplined accordingly. Mr. Maghsoudi also seeks compensation for the suffering and damage caused to him by members of management.

As against the Union, Mr. Maghsoudi claims a breach of the duty of fair representation and, in this respect, Section 30 of the Crown Employees Collective Bargaining Act provides as follows:

> "
> ...
> 30. An employee organization shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees, whether members of the employee organization or not.
> ..."

In his Complaint, Mr. Maghsoudi alleges that the Union has been "passive, impotent and/or conspiratorial". In particular, Mr. Maghsoudi says that the Union has failed to utilize the appropriate channels to address his concerns; that the Union has not adequately represented his interests at arbitration and that the conduct of the Union has only served to encourage management to engage in further discriminatory treatment.

At the outset of the hearing, Mr. Kenny, who appeared on behalf of the Respondent Ministry, requested that the Tribunal dismiss Mr. Maghsoudi's Complaint on the ground of delay. Mr. Kenny pointed out that the events outlined in the Complaint date as far back as 1972 and the most recent event referred to took place in January of 1987, just over a year prior to the filing of the Complaint. Mr. Kenny suggested that the events may not have had the same significance for members of management as they evidently did for Mr. Maghsoudi and yet, in many cases, these individuals would be required to recall what took place many years ago. Mr. Kenny further pointed out that a number of

members of management mentioned in the Complaint are no longer in the employ of the Ministry. In all the circumstances, Mr. Kenny contended that the Ministry would be seriously prejudiced if it were required to respond to the Complaint at this time. Alternatively, Mr. Kenny submitted that certain portions of the Complaint which do not allege a violation of the Crown Employees Collective Bargaining Act ought to be struck and, in respect of those allegations which could involve a violation of the Act, Mr. Kenny requested that we direct Mr. Maghsoudi to provide particulars of the material facts on which he relies.

It was also the submission of Mr. Wright, who appeared on behalf of the Respondent Union, that the Complaint of Mr. Maghsoudi ought to be dismissed on the ground of delay. Mr. Wright pointed out that the allegations against the Union cover the period from 1982 to May of 1985. The most recent event complained about, therefore, took place almost three years prior to the filing of the Complaint. With the passage of time, Mr. Wright suggested that memories fade and, like Mr. Kenny, Mr. Wright submitted that the Union would be prejudiced if it were put in the position of having to respond to Mr. Maghsoudi's Complaint. Alternatively, Mr. Wright contended that the Complaint is indefinite and incomplete so has to hamper the Union in the preparation of its case and he requested that Mr. Maghsoudi be directed to provide particulars of his Complaint.

In response to the objections advanced by the Respondents, Mr. Maghsoudi submitted that the events outlined in the Complaints were inter-related; that the incidents were reported to management as they occurred and that in respect of certain appraisals of his performance, grievances were filed which were dealt with by the Grievance Settlement Board. Mr. Maghsoudi further advised the Tribunal that he had kept records of all of the events as they occurred. Mr. Maghsoudi denied that either Complaint was incomplete or lacked particularity and he contended that there was no further information to which the Respondents were entitled at this stage. Finally, Mr. Maghsoudi suggested that the Tribunal was a forum of last resort which would entertain evidence of the discriminatory attitude and the perpetual persecution to which he has been subjected for many years. Mr. Maghsoudi requested, therefore, that the Tribunal proceed with the hearing on the merits.

In his Complaints, Mr. Maghsoudi expresses dissatisfaction with an investigation of his "manager's discriminatory attitudes" which was conducted by the Office of Ombudsman. This investigation evidently began in 1980 and culminated a number of years later in the release of a written report. In addition, Mr. Maghsoudi suggests that the Ministry has failed to comply with the terms of an award of the Grievance Settlement Board which was released in February of 1982 and he also complains about the conduct of a hearing before that Board and an award of the Board which was issued in August of 1985. It is not, however, the function of the Tribunal to comment upon the actions of the Office of the Ombudsman or to review proceedings before the

Grievance Settlement Board. The Tribunal has very specific and limited jurisdiction with respect to complaints which must allege a violation of the Crown Employees Collective Bargaining Act. The Tribunal does not have broad and unlimited authority to inquire into discrimination in the workplace and, if discrimination is relied upon, as it is in Mr. Maghsoudi's Complaint against the Ministry, it must be discrimination which is prohibited by the Act. Other forms of discrimination are beyond the jurisdiction of the Tribunal which is not a forum of last resort as suggested by Mr. Maghsoudi.

In his Complaint against the Ministry, Mr. Maghsoudi describes certain conduct on the part of members of management which he alleges was discriminatory but which does not appear to involve any violation of the Crown Employees Collective Bargaining Act. In fact, the bulk of Mr. Maghsoudi's Complaint is taken up with general allegations of discrimination involving activities which Mr. Maghsoudi says were intended to hamper his career development. For the most part, however, there is no suggestion that management acted in the way that it did because of a belief that Mr. Maghsoudi might testify in a proceeding under the Act or because Mr. Maghsoudi had made or was about to make a disclosure required of him in a proceeding under the Act or because he had made an application, filed a complaint or participated in a proceeding under the Act. These general allegations of discrimination, therefore, do not involve a violation of Section 37(1) of the Crown Employees Collective Bargaining Act or, for that matter, of any other Section of the Act.

At the same time, there are some incidents referred to in the Complaint which could involve conduct proscribed by the Act. By way of example, Mr. Maghsoudi alleges that he was improperly transferred after filing a grievance in respect of a performance appraisal. Although a causal connection between these events is suggested rather than specifically alleged, nevertheless, the actions of management could, if proven, constitute a violation of the Act. Similarly, Mr. Maghsoudi says that he was denied a legitimate request for educational assistance because of the fact that he had previously grieved his performance appraisals. In respect of those matters, which could constitute a violation of the Act, the Tribunal would, in appropriate circumstances, provide the complainant with an opportunity to properly frame his complaint and direct him to provide particulars. In this case, however, consideration must be given to the issue of delay.

In respect of Mr. Maghsoudi's Complaint against the Union, as pointed out by Mr. Wright, the most recent event relied upon took place almost three years prior to the filing of the Complaint. In respect of Mr. Maghsoudi's Complaint against the Ministry, the most recent event referred to took place in January of 1987. At that time, the Complainant indicates that he was engaged in discussions with representatives of the Ministry concerning a request which he had made to transfer to another work area. In fact, all the events which occurred after the spring of 1985 appear to relate to the efforts which were made to accommodate Mr. Maghsoudi's request. The final incident which suggests any violation of the Crown Employees Collective Bargaining Act occurred in January of 1985 at which time

Mr. Maghsoudi says that he made an inquiry about a "long overdue" grievance hearing which resulted in a renewed "wave of hasty reactions and provocative actions" on the part of Mr. Smith and another member of management. The other incidents which could involve a violation of the Act occurred previously, one as early as 1979.

A significant period, therefore, elapsed prior to the filing of the Complaints and the issue is whether the Tribunal ought to entertain the Complaints in these circumstances. In addressing this issue, it is useful to consider the jurisprudence of the Ontario Labour Relations Board which has considered the effect of delay in similar proceedings. In Sheller-Globe of Canada Limited, [1982] OLRB Rep. Jan. 113, the events which gave rise to the complaint of unfair representation against the union occurred two and one-half years prior to the filing of the complaint and in respect of the delay, the Board had this to say:

> "
>
> ...
>
> 13. A delay of the present magnitude carries with it an element of prejudice which is undeniable. Memories fade, and a party's ability to present a defence will deteriorate for that reason alone. This is particularly true when a party is not on notice that an action against it, requiring the litigation of certain events, remains pending. Here the respondent was justifiably under the impression that the grievance route, or any further demands against the union, had been abandoned in favour of other actions against the company. The lingering discussions which the complainant's husband had with Mr. Pattison and the stewards were clearly of an amicable nature; they provided no indication that action would subsequently be directed against the trade union itself, so that notes or other forms of evidence could be more actively maintained. The defence of the employer is not the defence of the trade union in these proceedings. The

> Board would be concerned not with the matter of cause for discharge, but rather the steps which the respondent's officials went through in concluding in their own minds that no grounds for a grievance existed. That defence would turn upon the recollection and credibility of the respondent's own officials. It might be noted parenthetically that the Labour Board, in administering the Labour Relations Act, is primarily concerned with the ongoing labour relations of a workplace, and such workplaces do not remain static over time. The Board as a result has always been conscious of the need for expedition in its practices and procedures. The delay in the present case raises concerns over an appropriate remedy, if the Board were to permit this complaint to now proceed, which are not fully answered by the complainant's concession as to damages. In circumstances such as the present, the onus shifts to a complainant to satisfy the Board that there are compelling labour relations reasons to cause the Board to exercise its discretion and entertain the complaint under section 89.
>
> ..."

In the Sheller-Globe case, the Board found the delay to have been extreme and determined that the complainant had not demonstrated compelling reasons to deliver her from the consequences of that delay. The Board, therefore, dismissed the complaint. A similar conclusion was reached in McKenly Daley v. The Amalgamated Transit Union, Local 1572 v. The Corporation of the City of Mississauga, [1982] OLRB Rep. Mar. 420 in which there was a delay of five years in the filing of the complaint. There, the Board made the following observation:

> "
>
> ...
>
> 22. A perusal of the Board cases reveals that there has not been a machanical [sic] response to the problems arising from delay. In each case, the Board has considered such factors as: the length of the delay and the reasons for it; when the complainant first became aware of the alleged statutory violation; the nature of the remedy claimed and whether it involves retrospective financial liability or could impact upon the pattern of relationships which has developed since

> the alleged contravention; and whether the claim is of such nature that fading recollection, the unavailability of witnesses, the deterioration of evidence, or the disposal of records, would hamper a fair hearing of the issues in dispute. Moreover, the Board has recognized that some latitude must be given to parties who are unaware of their statutory rights or, who, through inexperience take some time to properly focus their concerns and file a complaint. But there must be some limit, and in my view unless the circumstances are exceptional or there are overriding public policy considerations, that limit should be measured in months rather than years.
>
> ..."

In considering the effect of the delay in this case, we are of the view that it is appropriate to take into account factors similar to those considered by the Ontario Labour Relations Board in the decisions referred to. In this respect, as noted previously in both of the Complaints filed by Mr. Maghsoudi, the length of the delay is approximately three years and is even longer in relation to some of the incidents referred to. At the hearing, Mr. Maghsoudi offered no explanation for this delay. In his written Complaint, however, there was some suggestion that he delayed filing his Complaint against the Ministry because he was hopeful that he would be transferred to another work area and that this would bring an end to his difficulties. In our view, it would not be unreasonable for an employee to delay filing a Complaint for some reasonable period if he was optimistic that the problems which he was experiencing would be addressed and resolved. We do not find, however, that this can justify a delay of the length which occurred in this case. At least as early as 1980, Mr. Maghsoudi believed that he was being

discriminated against by members of management and he both recorded and reported the events set out in the Complaint to management as they occurred. There is, however, no indication that the Ministry was ever made aware that Mr. Maghsoudi intended to file a Complaint with the Tribunal and a party's ability to present a defence necessarily deteriorates with the passage of time as memories fade and witnesses may no longer be available. In this case, there was also nothing to suggest that the Union was on notice prior to February of 1988 that Mr. Maghsoudi intended to claim that there had been a breach of the duty of fair representation or, for that matter, that he intended to make any claim against the Union. This is clearly a case which will turn on credibility and the issue is not simply whether Mr. Maghsoudi is in a position to present his case but whether a fair hearing can be conducted given the nature of the delay.

At the hearing, Mr. Maghsoudi did not suggest that he was unaware of his statutory rights and, in fact, during the period covered by his Complaints, he filed two grievances which were dealt with by the Grievance Settlement Board. Nevertheless, Mr. Maghsoudi has filed Complaints against both the Ministry and the Union and he elected to process these Complaints on his own behalf. In these circumstances, the Tribunal would be inclined to accord Mr. Maghsoudi some latitude in the filing of his Complaints but, once again, we find that this cannot excuse a delay, which, at minimum, is approximately three years. In this case, Mr. Maghsoudi is also claiming damages, although the precise extent of the compensation which he seeks is not clear. In any event, in the face of a very

lengthy delay, for which no adequate explanation was provided, the Tribunal is compelled to conclude that it would not be appropriate to inquire into Mr. Maghsoudi's Complaints.

For these reasons, the Complaints are hereby dismissed.

DATED AT TORONTO, this 2nd day of December, 1988.

J.H. Devlin, Vice-Chairperson

M.J. Sullivan, Member

J.H. McGivney, Member

Ontario Public Service
Labour Relations Tribunal

Fonction Publique de l'Ontario
Tribunal Administratif des Relations du Travail

180 Dundas Street West, Suite 2100, Toronto, Ontario M5G 1Z8

416/598-0688

T0005/88

IN THE MATTER OF AN APPLICATION

Under

THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

Before

THE LABOUR RELATIONS TRIBUNAL

Between:	P. Kiviloo	Grievor
	-and-	
	The Crown in Right of Ontario (Ministry of Correctional Services)	Employer

Before:	M. Mitchnick	Alternate Chairperson
	M. Sullivan	Member
	J. McGivney	Member

For the Grievor: P. Kiviloo

For the Employer: L. M. McIntosh
Counsel
Crown Law Office, Civil
Ministry of the Attorney General

Hearing: October 28, 1988

D E C I S I O N

This is an application under section 32 of the Crown Employees Collective Bargaining Act, alleging that the employer has violated section 29(1) of the Act. The latter section provides:

> 29 (1) No person who is acting on behalf of the employer shall participate in or interfere with the selection, formation or administration of an employee organization or the representation of employees by such an organization, but nothing in this section shall be deemed to deprive the employer or any person acting on behalf of the employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

The grievor at a meeting of May 13, 1988, was handed a letter terminating him as a result of an incident that occurred on April 26, 1988 (and in the context of an earlier arbitration award involving the grievor). The grievor has grieved his discharge, and one day of hearing has taken place before the Grievance Settlement Board. Two further days of hearing are also currently scheduled for November 16th and December 12th. Unlike here, the grievor before the Grievance Settlement Board is represented by Union counsel. On May 12, 1988, a meeting had been held to inquire into the incident of April 26th, at which the grievor's entitlement to Union representation was,

the grievor states, acknowledged in accordance with the employer's past practice, and at which the grievor did in fact have Union representation. The complaint asserts that no conclusion was arrived at by management by the end of that meeting on the 12th. The complainant alleges that the May 13th meeting was therefore, a continuation of the disciplinary process, and that he did not have Union representation thereat. The complainant seeks to call evidence of what in fact transcribed at that meeting, in support of his contention that it was still part of the May 12th disciplinary meeting. The grievor states that if this denial of representation was in fact a violation of section 29 of the Act, then he is entitled to be re-instated with back pay, and cannot be further discharged for that April 26th incident. As a result, the grievor states that he sees the present application as potentially a simpler way of eliminating the proceedings on-going before the Grievance Settlement Board.

Without getting into the merits of the arguments, however, we would have to agree with counsel for the Ministry that even a decision from the Tribunal re-instating the grievor because of a procedural defect would not necessarily mean an end of present discipline, or of any further proceedings before the Grievance Settlement Board. But our concern over where this matter ought to be proceeding at this point goes beyond that. Procedural fairness is an element in any "discharge" case - but that is exactly what it is: one element in the overall discharge case. There is no provision, we are advised, in the

collective agreement making pre-discharge Union representation mandatory, and the grievor relies on only the general provisions of the Act. The Tribunal does in fact have broad remedial powers in exercising its discretion under the Act (which the employer does not concede would include re-instatement in the case before us), but assuming we did have the jurisdiction to re-instate, it would be difficult, and conceivably unfair, for the Tribunal to decide what the appropriate remedy for the alleged defect might be, without the full context of the discharge case itself, the employer's investigation, and any other relevant evidence being before us. That is an advantage that a board of arbitration has, and the normal way of proceeding in matters of this kind is in fact in the single forum of arbitration, where the discharge may be attacked on

(1) grounds of procedural fairness, and

(2) the "merits" of the discharge,

all of which are fairly part of the arbitration board's decision as to whether, for example, even if there was cause for discipline, the arbitration board's discretion to modify the penalty ought to be applied. By the same token a judgement would have to be made in the present case, there being no provision in the collective agreement making union representation explicitly mandatory, whether, even if there was in some way a defect in the procedure, there was any prejudice occasioned thereby, or in broader terms, any miscarriage of justice, and the employer could not be precluded from placing before the Tribunal any and all evidence which could arguably

be relevant to that conclusion. All of these comments are simply meant to underscore, in light of the reliance on remedy by the grievor in seeking to proceed before the Tribunal ahead of the Grievance Settlement Board, the potential interconnectedness of the issues of procedure and the merits.

As a result, we accept the submission of Ms. McIntosh that the appropriate forum for proceeding with this matter is at this point the Grievance Settlement Board, which has currently scheduled proximate dates for continuation of the hearing, and which is the forum in the best position to consider the matter in its fuller context, should it so choose. It follows from Ms. McIntosh's comments that, from the employer's point of view, the grievor will have the opportunity to have examined both the question of procedural fairness and of the merits, as the grievor and his counsel may consider appropriate, in the proceedings before the Grievance Settlement Board. We therefore consider it appropriate to defer the matter to the Grievance Settlement Board at this time, noting Ms. McIntosh's further undertaking that if the outcome of the Grievance Settlement Board proceedings leaves an issue to be dealt with by the Tribunal (i.e. the applicability of section 29 of the Act to this form of "representation") the Ministry will, from an evidentiary point of view, be bound by any findings of fact with respect to procedural questions, made by the Grievance Settlement Board.

In the result it is unnecessary for us to consider the Ministry's further grounds for seeking an adjournment, based on the unavailability of counsel having carriage of the matter, and on the outstanding offer of settlement (with respect to all proceedings) which may or may not remain to be canvassed by the parties.

To sum up, we are all anxious that the matter, as a discharge case, proceed as expeditiously as possible. But whatever the forum, it is simply our judgment, based on our experience, that the remedy which the grievor seeks is not readily available without what conceivably could amount to full litigation of the matter, and the appropriate place for such litigation, as normal, is the Grievance Settlement Board. Hopefully that body will be in a position to schedule forthwith as many days as counsel feel are needed to complete the matter, within a reasonable time frame. The Tribunal complaint however stands adjourned sine die, pending a final decision of the Grievance Settlement Board, or other disposition of the case. When that stage has been reached, the Tribunal would ask that the parties advise it whether the complaint will subsequently be continuing in this forum, or whether the proceedings are to be terminated.

Decision rendered orally at Toronto the 4th day of November, 1988.

M. Mitchnick,
Alternate Chairperson

M. Sullivan, Member

J. McGivney, Member

Ontario Public Service
Labour
Relations
Tribunal

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T/0015/88

IN THE MATTER OF A COMPLAINT

Under

THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

Before

THE LABOUR RELATIONS TRIBUNAL

Between:

Ontario Public Service Employees Union
(Frawley)

Applicant

- and -

The Crown in Right of Ontario as represented by the
Ministry of Community & Social Services

Respondent

BEFORE:	P. Picher	Chairperson
	W. Walsh	Member
	J. Coups	Member

FOR THE APPLICANT:
T. McEwan
Counsel
Gowling, Strathy & Henderson
Barristers & Solicitors

FOR THE RESPONDENT:
S. Patterson
Counsel
Legal Services Branch
Management Board of Cabinet

HEARING:
December 9, 1988
April 17, 29, 1989
September 21, 22, 1989
January 22, 1990
April 9, 1990
June 22, 1990
October 29, 1990
May 16, 1991
October 22, 1991
April 30, 1992

Written submissions submitted on:
May 15, 1992
June 9, 12, 1992

DECISION

The Union, the Ontario Public Service Employees' Union, has filed a complaint that the Respondent, the Ministry of Community and Social Services, has breached the provisions of section 29 (2) of the **Crown Employees Collective Bargaining Act**, R.S.O. 1990, C. 50 which provides as follows:

> 29 (2) The Employer or any person acting on behalf of the employer shall not,
>
> (a) refuse to employ or to continue to employ or discriminate against a person with regard to employment or any term or condition of employment because the person is exercising any right under this Act...;
>
> (b) impose any condition on an appointment or in a contract of employment that seeks to restrain an employee...from exercising any right under this Act;
>
> (c) seek by intimidation, by threat of dismissal or by any other kind of threat or by the imposition of a pecuniary or any other penalty or by any other means to compel an employee ... to refrain from exercising any other right under this Act; ...

The Union asserts that from April of 1986 to the present, the Respondent has continuously discriminated against Mr. Timothy Frawley contrary to section 29 (2) (a) of the **Act** because of his resort, on two occasions, to the grievance procedure to seek redress for claims respecting pay and a permanent appointment to the management position of Team Manager. The Union further asserts that the Respondent has breached ss. 29 (2) (c) of the

Act in seeking, by intimidation, to compel Mr Frawley to refrain from exercising his rights under the **Act**. The Respondent denies that there has been any contravention of section 29 (2) of the **Act.**

A. FACTS AND DECISION ON WHETHER THE RESPONDENT BREACHED THE ACT:

Having carefully reviewed the evidence and the submissions of the parties, the Tribunal draws the following conclusions of fact and law:

1. Mr. Frawley started his employment with the Ministry of Community and Social Services (COMSOC) in December of 1979. He had a masters degree in psychology and worked in the position of Psychometrist 2 (Masters).

2. In December of 1980 he made a lateral transfer, in the same position, to the Bluewater Centre which was operated by the Respondent in Goderich, Ontario. In the summer of 1983, COMSOC decided to close the Bluewater Centre. Mr. Frawley, among others, was declared surplus.

3. The Oxford Regional Centre (ORC) is a COMSOC facility operated in Woodstock, Ontario. Many of the residents suffer from varying degrees of mental and physical handicap. In June of 1983, Mr. Mike Connell, the Director of the Community Services program at the

ORC, offered Mr. Frawley a position in the ORC's expanding community services program to deliver out-patient services to the community.

4. By an exchange of letters between Mr. Frawley and Mr. J.M. Hamilton, the Regional Director of the South West Region, in August of 1983, Mr. Frawley was appointed to the position of Unit Psychologist at the ORC at his existing level of Psychometrist 2 (Masters). In the letter from Mr. Hamilton to Mr. Frawley dated August 17, 1983, Mr. Hamilton states, "As discussed, this is a Community Services position which shall entail consulting work within the Goderich area." In a subsequent letter dated August 26, 1983, Mr. Hamilton confirmed that Mr. Frawley's position would further involve "**supervision of a Behaviourial Counsellor and the operation of a satellite office**". Because of rules relating to surplus lists, Mr. Frawley could not be promoted immediately upon his transfer from the Bluewater Centre and some care had to be taken in the initial description of his duties.

5. Mr. Frawley testified, without contradiction, that at the time of the above exchange of letters in August of 1983, he and Mr. Hamilton came to a verbal agreement that COMSOC would appoint Mr. Frawley to a management position to carry out his duties of being in charge of the operation of the satellite office in Goderich for the Community Services Department of the ORC, as is stated in the letter of August 26, 1983.

6. Mr. Frawley started his new job on October 17, 1983. The evidence readily establishes that from the outset he functioned as the Team Manager of the Goderich

satellite office and exercised managerial functions. Mr. Frawley developed the Goderich office from its beginnings. In the fall of 1983, he participated in the hiring of staff for the Goderich Community Service team including a counsellor, a nurse and a part-time secretary. He became their supervisor. In June of 1984, he further participated in the hiring of a social worker and assumed his supervision as well. Initially, Mr. Frawley operated the satellite office out of his home. In January 1984, however, he found office space in Goderich and equipped the office. **Of importance to the matter at hand, the Tribunal is satisfied that from the date of his initial appointment at the ORC, Mr. Frawley functioned in a managerial capacity as the person in charge of the Goderich office. Regardless of his designation, he worked from the outset as the Team Manager.**

7. In addition, the Tribunal concludes that Mr. Frawley's position as Team Manager of the Goderich satellite office was intended to be permanent. Mr. Frawley's position in Goderich existed for 6 years, from 1983 to 1989. Although the Team Manager positions were set up in a hurry, the evidence does not support the assertion that they were intended to be temporary. The trend of the Ministry, commencing at or about this time, was to put more emphasis on community service and to close some of the residential facilities. The development of the community service teams was part of a 5-year plan incorporating that philosophy. There is no solid indication in any of the evidence that the Team Manager positions were viewed by the management as being temporary. **We conclude on the basis of a review of all the evidence and submissions that from the outset the Team Manager**

positions were considered by the management at the ORC to be permanent for the foreseeable future.

8. Mr. Malcom Coubrough, Manager of Human Resources, and Mr. Mike Connell, Mr. Frawley's direct supervisor, told Mr. Frawley that his official appointment as Team Manager would have to await the appointment of the two other Team Managers, one for a satellite office being established in Woodstock and one for a third office in London. He was told that the official Team Manager appointments would constitute an organizational change and would be done for all three at once.

9. Approximately one year after Mr. Frawley's appointment, on October 9, 1984, Mr. Fred Munn was assigned as Team Manager of an ORC community service team based in London. Mr. Munn and his team functioned in a manner parallel to Mr. Frawley and his team. Mr. Munn had previously held a management position at the AM-18 level within the ORC.

10. The evidence establishes to the satisfaction of the Tribunal that Mr. Munn was not seconded to the position of Team Leader. He was appointed outright. There is no reference to the appointment being a secondment in any of the documents submitted into evidence. An official appointment document dated December 2, 1985 states that it is an appointment to a management position, that of Team Manager, at the AM-18 level. In cross examination, Mr. Bill Fenlon, the Assistant Administrator for the ORC, admitted that the appointment

of Mr. Munn was not a secondment. Mr. Coubrough also acknowledged that Mr. Munn was not seconded. **Accordingly, the fact that Mr. Munn was given a higher salary than Mr. Frawley once the appointments were formalized, as set out below, cannot be justified, as claimed by the Respondent, on the principle that Mr. Munn was seconded from an AM-18 level job and thus carried his AM-18 salary with him.**

11. Further in the fall of 1984, a third Team Manager was assigned. Mr. Jack Edwards became the Team Manager for the community service team operating out of Woodstock, Ontario. Mr. Edwards had previously held a management position at the level of PM 16 within the ORC organization.

12. By the fall of 1984, Mr. Frawley had worked in the position of Team Manager of the Goderich community service team for a year. His appointment as Team Manager, however, had not yet been reduced to writing and he was still classified as a Psychometrist 2 (Masters) while Mr. Munn, who was doing the same job, was specifically designated as Team Manager and paid at the AM-18 level. Throughout the fall, Mr. Frawley pressed COMSOC to formalize his appointment as Team Manager. **The Tribunal, on the basis of uncontradicted evidence, concludes that during this time, Mr. Frawley was led to believe by Mr. Connell that his position, once formalized, would be a permanent appointment, as Team Manager, at the AM-18 level, with retroactive pay to October of 1983, when he started in the position.**

13. In the summer and fall of 1985, Mr. Frawley, at the direction of Mr. Connell, worked on the job specification for the three Team Manager positions. The specification for the permanent, full-time position of Team Manager was finalized in October of 1985. Mr. Connell continued to assure Mr. Frawley that by December of 1985, he would be appointed Team Manager at the AM-18 level and provided with retroactive pay back to October of 1983. There was no suggestion by Mr. Connell that Mr. Frawley's appointment would be on an acting, instead of permanent, basis.

14. **Contrary to Mr. Frawley's expectations, which the Tribunal has found were reasonably based on assurances and conversations with his supervisor, Mr. Connell, Mr. Frawley, in December of 1985, was appointed to the Team Manager on an acting, instead of permanent, basis. Moreover, the appointment was made without retroactive pay. In addition, the job was designated by Human Resources at the AM-17 level instead of AM-18**. The AM-17 classification was confirmed by the Public Service Classification Rating Committee, (C/6/88), in a decision dated May 24, 1991. Mr. Edward's appointment was acting as well and also paid at the AM-17 level. Mr. Munn's appointment, on the other hand, was to a permanent Team Manager position, with pay at the AM-18 level.

15. On December 12, 1985, Mr. Frawley had a meeting with Mr. Coubrough and Mr. Connell to learn the reason for COMSOC's decisions in respect of his appointment. Having carefully reviewed the evidence, including Mr. Coubrough's acknowledgement on cross examination that it was possible that he made the statements referred to below, **the**

Tribunal accepts Mr. Frawley's evidence that Mr. Coubrough told Mr. Frawley that Mr. Munn, who was known to be at the AM-18 level, would have his salary red circled in view of the classification of the position at the AM-17 level, and that he would be reclassified at the AM-17 level. The red circling and reclassification, however, never happened.

16. Respecting the failure of COMSOC to give Mr. Frawley retroactive pay, Mr. Coubrough advised Mr. Frawley that he did not receive retroactive pay because the position had only been classified in December of 1985. Respecting the "acting" aspect of the appointment, Mr. Coubrough informed Mr. Frawley that his appointment had to be on an acting, as opposed to a permanent, basis because of a problem with a "surplus lists" which had resulted from the closure of another COMSOC facility. Mr. Coubrough commented that Mr. Doug Goodbun, the Administrator of O.R.C., wanted the positions to be acting positions so that they wouldn't be opened up to the surplus list. Mr. Coubrough told Mr. Frawley that the appointment would be "acting" until the surplus list was cleared, following which a permanent appointment would be made. Mr. Fenlon testified that it was anticipated that the Team Manager positions would be acting for a year or so. He acknowledged that he understood that after a period of acting status, the Team Manager jobs would be regularized, i.e. made permanent. He agreed that it would be strange to have the acting status extend for longer than a year.

17. Mr. Frawley testified, and the Tribunal accepts, that at the end of the meeting of December 12, 1985, Mr. Coubrough said to Mr. Frawley, "Go ahead and grieve. I've got

you no matter what you do." Mr. Coubrough told Frawley that as a bargaining unit employee, he had no right to dispute a management position and that as an incumbent of a management position, he had no right to grieve under the **Act**.

18. **Of particular importance to the Union's complaint of a breach of the Act, Mr. Frawley filed a grievance on or about February 6, 1986 under the collective agreement between the Ontario Government and O.P.S.E.U.** He requested retroactive pay at the AM-17 level back to October 17, 1983, when he started his Team Manager work at the Goderich satellite office. His grievance states, "I grieve that I did not receive acting pay in the position of Team Manager (ASL17) for the period of October 17, 1983 to December 1, 1985", when he was officially appointed to the position in an acting capacity.

19. An option put forward by Mr. Coubrough for Mr. Goodbun to consider in dealing with the grievance was to let Mr. Frawley's grievance go to the Grievance Settlement Board, to remove the acting status for Frawley's Team Manager job, to post the job and then to restrict the competition to the surplus list. These steps would have had the effect of removing Mr. Frawley from the Team Manager job because he was not on the surplus list. In evidence, Coubrough stated that he could not recall his rationale for this option and acknowledged that it would have been punitive. The Union comments that this evidence reveals that from the outset of the grievance, the thought of punishing Mr. Frawley existed within management.

20. **By a Memorandum of Agreement dated April 3, 1986, Mr. Frawley's grievance was settled**. The persons involved in the settlement discussions were Mr. Coubrough, Mr. Vic Cooper, the OPSEU staff representative for the ORC, and Mr. Frawley. COMSOC agreed to raise Mr. Frawley's salary to the maximum for Level AM-17, to give him approximately 8.75 M.C.O. (management compensation option) days and to pay him $8,000.00 "for services rendered during the time frame reference in the grievance." It is the position of the Respondent that the $8,000.00 represents more than retroactive pay and includes a settlement of overtime claims as well. In contrast, the Union asserts that the $8,000.00 was fully in lieu of retroactive pay and that an overtime claim was not part of the grievance.

21. The alleged overtime element in the grievance settlement becomes important because it is subsequently focused on by members of management to condemn both the settlement and Mr. Frawley. Having carefully reviewed the evidence, **the Tribunal concludes, however, that the settlement did not involve a payment in respect of claimed overtime.** In reaching this conclusion, we have particular regard for 1) the fact that the claim in the grievance seeks only retroactive pay and does not make any reference to overtime, 2) the clear evidence of Mr. Frawley that neither the grievance nor the settlement involved a claim for overtime and 3) the cross examination of Mr. Coubrough wherein he acknowledged that the value of Mr. Frawley's salary differential for the retroactive pay was within the range of $8,000.00 to $9,000.00 which is roughly equivalent to the $8,000.00 payment in the settlement for "services rendered". The fact that overtime worked by Mr. Frawley might have been discussed between the parties in the course of the settlement negotiation does

not establish, by any means, that part of the settlement was in respect of overtime. **The view held by some members of management that overtime was being claimed by Mr. Frawley and/or paid in the settlement was an erroneous view for which Mr. Frawley is not responsible**.

22. The Union's complaint that the Respondent has breached its obligations under section 29 (2) of the **Act** stems in large measure from the Respondent's response to Mr. Frawley's grievance.

23. During the period surrounding the grievance, Mr. Frawley's administrative supervisor was Mr. Connell, the Director of Community Services for the ORC. Mr. Connell, in turn, reported to Mr. Fenlon, the Assistant Administrator of the ORC. The clinical work Mr. Frawley was doing as a psychometrist, however, was supervised by a registered psychologist on the staff of the ORC, Mr. Bob Carey. For clinical purposes, Mr. Carey reported to the Chief Psychologist of the ORC, Dr. Milton Blake. Dr. Blake, in turn, reported to Mr. Fenlon.

24. Mr. Blake formed the mistaken view, apparently through discussions with Mr. Coubrough, that Mr. Frawley's grievance involved a claim for overtime. Mr. Fenlon stated, in evidence, that he knew the grievance was regarding back pay, not overtime. He was of the view, however, that Mr. Frawley's grievance had been settled too quickly and his evidence reveals that he persisted in discussing it as a grievance involving an overtime claim.

Mr. Fenlon said that he was disturbed about the "overtime" aspect of the grievance for fear that it would open a floodgate of overtime claims that might not have merit. He stated that Mr. Blake's letter, set out below, reinforced his concern that the "overtime claim" had been settled too quickly.

25. **Mr. Blake and, we find, Mr. Fenlon, concluded that through the grievance procedure Mr. Frawley had taken unfair advantage of the ORC management**. By a letter dated April 9, 1986, Mr. Blake accused Mr. Frawley of unethical behaviour and of exploiting the system by receiving a substantial retroactive award for claimed overtime in the settlement of his grievance:

> Dear Tim:
>
> I recently learned that a **settlement was reached in the second stage of the grievance you filed in which you received a substantial retroactive award for claimed overtime. I am writing to apprise you of my dismay and regret at your "success" in this pursuit, which I have good reason to believe reflects a false and unscrupulous set of dealings on your part**.
>
> First, it is common knowledge that you were in the practice, for an extended period, of taking Fridays off as compensation time for accumulated overtime. That you omitted this information during the grievance negotiations suggests a hiding of information you obviously felt could have called the legitimacy of the overtime part of your grievance into question. Secondly, I have a record of having contacted you on two specific occasions, following the establishment of the Goderich office, where you were not at this office but at home. As I have called you infrequently, (a total of four times over the period of your employment), your absenteeism rate during randomly placed telephone calls is 50% -- a figure that is "somewhat " higher than one might expect in an employee who is presumably

allowing overtime credit to accumulate. Neither of these points prove beyond a scintilla of doubt that you didn't do overtime, but they would certainly raise nagging suspicion and scepticism in the minds of most people.

There are additional factors I could cite which cast doubt on your claim, but I will not elaborate these here. **I would simply like to tell you that it is only because proper overtime logging procedure was not established (some of the responsibility for which rests with you) that you have been able to get away with what I suspect is one of the more disturbing examples of unethical behaviour I have seen in a long time. Individuals such as yourself who are past masters at exploiting the system for their own gain, give their profession a bad name** and without realizing it, ultimately thus work against their own interests.

Although I doubt you will follow my advice, I would sincerely urge you to take a hard look at your own behaviour in this affair, and if not to others, then at least to yourself, acknowledge the facts. For a man of your obvious talent to misdirect it by putting it to such contemptuous uses seems a rather tragic waste.

Milton Blake, Ph.D., C.Psych.
Chief Psychologist

[emphasis added]

26. **Counsel for the Respondent concedes that Mr. Blake's letter to Mr. Frawley constitutes prima facie evidence of a breach of section 29 (2) of the Act. Counsel states that the Ministry, both in its evidence and submissions, accepts that this letter is an inappropriate response to the filing and settling of Mr. Frawley's grievance**.

27. Counsel for the Respondent, however, relies on the Respondent's alleged subsequent actions in quelling the letter to argue that the Respondent's further actions neutralized Mr. Blake's unfortunate response. Counsel asserts that the management of the ORC acted quickly to convene a meeting with Mr. Frawley, to have the letter destroyed and to remove it from all files. He observes that management advised Mr. Blake of the inappropriateness of the letter, that they unilaterally offered to waive time limits for Mr. Frawley if he chose to grieve the contents of the letter, and, finally, that Mr. Blake was removed from any management or professional interaction with Mr. Frawley so that he would have no further influence on Frawley's career.

28. **Having carefully reviewed the evidence and submissions, the Tribunal concludes that through Mr. Blake's response to Mr. Frawley's grievance, the Respondent breached section 29 (2) of the Act. It is readily apparent, as conceded by the Respondent, that through Mr. Blake, the Respondent discriminated against Mr. Frawley for having filed and settled a grievance. The Respondent further sought by intimidation to compel Mr. Frawley to refrain from further exercising his rights under the Act.** We agree with the assertion of the Union that Mr. Fenlon and Mr. Blake had formed the opinion that Mr. Frawley was "some kind of 'rip off' artist who had used the grievance process to take unfair advantage of management".

29. **Of particular importance to the matter at hand, the Tribunal further concludes that the actions of management at the ORC subsequent to the Blake letter did not nullify the**

breach set out above. Contrary to the suggestion of the Respondent, the evidence establishes that it was not the management of the ORC that convened a meeting with Mr. Frawley to address the Blake letter, to remove it from all files and to have it destroyed. Instead, it was Mr. Frawley who complained to Mr. Connell and Mr. Connell who, in turn, complained to Mr. Fenlon. It was at Mr. Frawley's initiative, not management's, that Mr. Connell set up a meeting on April 30, 1986 to address Mr. Blake's letter.

30. Although Mr. Fenlon directed Mr. Blake to remove the letter from Mr. Frawley's file, he did nothing to correct Mr. Blake's misunderstanding of the nature of Mr. Frawley's grievance. Mr. Fenlon was supposed to write a letter to Mr. Blake to clarify the situation but such a letter was never sent. It was not until May of 1988 that Mr. Blake learned directly from Mr. Frawley and Mr. Connell that Mr. Frawley's grievance had not involved a claim for overtime. Mr. Blake acknowledged, in evidence, that if Mr. Frawley's grievance had actually been a salary claim for having started up the Goderich office, his assertion of unethical behaviour could not stand up.

31. The evidence readily establishes that Mr. Fenlon carried significant ill will towards Mr. Frawley. On February 6, 1987, Mr. Frawley made a presentation at a meeting of ORC managers concerning the impact of COMSOC's five year plan on community services. The presentation was a summary of the report of a task force which Mr. Frawley had chaired with two other colleagues. Mr. Fenlon strongly disagreed with the conclusions of the report. Following Mr. Frawley's presentation and in front of the whole gathering, Mr. Fenlon made

a highly critical, personal attack on Mr. Frawley. He accused Mr. Frawley of being interested in himself only, of "feathering his nest" and of attempting to destroy the ORC. His manner was combative and his tone was angry. Mr. Connell was so upset by Mr. Fenlon's attack that he had to be restrained by Mr. Coubrough. Mr. Coubrough confirmed that he perceived Mr. Fenlon's attack against Mr. Frawley to be personal. Mr. Fenlon never apologized for his conduct.

32. Counsel for the Respondent states that Mr. Fenlon's reaction to Mr. Frawley's presentation was professional only and reflected the significant schism that exists between residential and community treatment philosophies in the care of the developmentally handicapped. Counsel asserts that to leap from the professional disagreement to a violation of the **Act** is unsubstantiated. Counsel emphasizes that the rest of management had a positive reaction to Mr. Frawley's proposal. He maintains that the fact that Mr. Frawley was invited by management to make the presentation to the meeting contradicts a management vendetta.

33. Counsel for the Union, on the other hand, describes Mr. Fenlon's unprovoked attack as strong evidence of Mr. Fenlon's bias against Mr. Frawley which he maintains can only be explained by the ill will that was generated against Mr. Frawley as a result of Mr. Frawley's grievance. Counsel asserts that the only reasonable explanation for the attack is Mr. Fenlon's dissatisfaction with the grievance settlement and his view that Mr. Frawley had taken unfair advantage of management through the grievance.

34. Mr. Fenlon denied that his response to Mr. Frawley in the February meeting had any relationship to his feelings about Mr. Frawley's grievance. Mr. Blake, however, acknowledged before the Tribunal that Mr. Fenlon was harbouring a grudge against Mr. Frawley for the grievance. Mr. Blake stated that through comments Mr. Fenlon had made to him at the time, he knew that Mr. Fenlon still had "an axe to grind" over what he considered to be Mr. Frawley's unscrupulous attempt to exploit the system through his grievance. Mr. Blake stated that he assumed that this is why Mr. Fenlon attacked Mr. Frawley so aggressively at the meeting.

35. **Having regard to all the evidence, the Tribunal concludes that Mr. Fenlon's personal attack against Mr. Frawley at the February 6, 1987 meeting of the O.R.C. management was a breach of Section 29(2) of the Act in that it constituted discrimination against Mr. Frawley for having exercised his grievance rights under the Act**.

36. After the departure of Mr. Goodbun and for much of 1986, the ORC was left without a permanent Administrator. In December of 1986, though, when the surplus last cleared, Mr. Coubrough advised Mr. Lloyd Jackson, the acting Administrator, that the way was now clear to make the acting Team Manager appointments permanent. Mr. Jackson declined to do so, commenting that he didn't want to tie the hands of the new administrator.

37. **On January 4, 1987, Mr. John Hewitt was appointed the permanent Administrator of the ORC**. Both Mr. Fenlon and Mr. Coubrough briefed Mr. Hewitt on Mr. Frawley's

situation. Mr. Coubrough advised Mr. Hewitt that the surplus list was clear and that the way was open to appoint Mr. Frawley to the position of Team Manager on a permanent, as opposed to acting, basis. Mr. Coubrough explained to Mr. Hewitt that the position of Team Manager had been filled by Mr. Frawley and Mr. Edwards on an acting basis for a long time and that he was uncomfortable carrying their acting status much longer. He told Mr. Hewitt that it had been going on for a couple of years, that it was well beyond the normal time limit and that he wanted the situation resolved. Mr. Hewitt refused. In cross examination, Mr. Coubrough stated that Mr. Hewitt said that he wasn't prepared to do it then and to "b.f." it later. Mr. Coubrough left the ORC in October of 1987, at which point no change had been made in Mr. Frawley's acting status.

38. At the time of Mr. Coubrough's approach to Mr. Hewitt, in or about January of 1987, Mr. Frawley had officially been in the Team Manager position in an acting capacity for well over 1 year. The evidence establishes that the Ontario Government's Manual of Administration establishes one year as the anticipated outside limit for an acting appointment. As it turned out in the instant matter, Mr. Frawley was left in an acting capacity for 3-1/2 years.

39. Throughout Mr. Frawley's work with the Ministry, there has not been the slightest mark against the quality of his work performance. To the contrary, Mr. Frawley has been given very positive evaluations of his work performance by both his peers and managers. Mr. Coubrough stated that his "track record and abilities" would have strongly endorsed a

permanent appointment for him as Team Manager. It is clear that the refusal to appoint Mr. Frawley to a permanent management position was not based on his work performance.

40. It is the position of the Union that the only reasonable explanation for Mr. Hewitt's failure to appoint Mr. Frawley to the Team Manager position on a permanent basis when approached by Mr. Coubrough to do so was that Mr. Hewitt had become infected with the same **animus** against Mr. Frawley as was held by Mr. Blake and Mr. Fenlon.

41. It is the position of COMSOC, on the other hand, that the reason Mr. Hewitt did not appoint Mr. Frawley on a permanent basis when approached by Mr. Coubrough to do so was that it was within the first few months of his mandate and he was occupied with other priorities. Counsel for COMSOC comments that other witnesses stated that at the time in question, early 1987, there were a high number of grievances, organizational and community pressures and overall stresses on the organization.

42. **Mr. Hewitt, however, did not testify**. Only Mr. Hewitt is able to explain why he did not authorized Mr. Frawley's permanent appointment when advised by Mr. Coubrough that the surplus list had cleared and that the acting status should be concluded. It was the existence of the surplus list that had been management's explanation for making the Team Manager appointments acting, as opposed to permanent, in December of 1985. Given that management's own Manual of Administration indicates that acting appointments should not normally exceed a year and given that, in the end, Mr. Frawley was left in the acting

appointment for approximately 3-1/2 years, **the Tribunal concludes that it was incumbent on Mr. Hewitt to come forward with an explanation for his failure to appoint Mr. Frawley to his position as Team Manager on a permanent basis**.

43. There is no direct evidence that Mr. Hewitt was facing such pressing priorities when approached by Mr. Coubrough that he was unable to divert his attention to resolve the acting status of Mr. Frawley. In all of the circumstances, the Tribunal draws an adverse inference from Mr. Hewitt's failure to testify and concludes that his testimony would not have been favourable to the position of COMSOC.

44. **In the result, the Tribunal concludes, on the balance of probabilities, that the reason Mr. Frawley was not appointed to the position of Team Manager on a permanent basis in accordance with management's own policies on acting appointments, and, instead, was left in the position on an acting basis for 3-1/2 years was based, initially, on an animus against Mr. Frawley for having exercised his grievance rights under the Act and was extended, subsequently, by continuing animus against Mr. Frawley which was compounded by the filing of a second grievance on March 10, 1988, as set out below**.

45. Mr. Frawley was not advised in the spring of 1987 that the surplus list had cleared and that Mr. Hewitt had refused to make the appointment permanent. Accordingly, throughout the rest of 1987, Frawley continued to check with Mr. Connell and Mr.

Coubrough concerning a permanent appointment to the Team Manager position, but nothing happened.

46. Approximately a year later, in January or February of 1988, Mr. Frawley learned for the first time that Mr. Munn had not been red circled after the Team Manager job had been formally classified at the AM-17 level instead of AM-18. Mr. Frawley had been induced to settle his first grievance based on retroactive pay at the AM-17 level because he was told by Mr. Coubrough that Mr. Munn, who was at level AM-18, would be red circled (see para 15, above). In March of 1988, Mr. Connell formally asked Mr. Fenlon to increase the salaries of Mr. Frawley and Mr. Edwards to the AM-18 level received by Mr. Munn. Mr. Fenlon passed the recommendation to Mr. Hewitt without endorsement.

47. **On March 10, 1988, Mr. Frawley brought a second grievance**. He asked for acting pay at Level 18 from October 17, 1983, when he started in the position, in view of the fact that Mr. Munn had been receiving Level 18 pay, without red circling, from the outset of his appointment as Team Manager. It is the position of the Union that Mr. Frawley's second grievance incensed the ORC management and caused them to persist in their breach of the **Act**.

48. **Mr. Dick Clarke**, the Regional Human Resource Manager for COMSOC, responded to the grievance. **He denied the grievance on the basis that Mr. Munn's appointment to the Team Manager position had been a secondment from an AM-18 level job**. As concluded

above, however, (see para 10), the Tribunal has found that Mr. Munn's appointment was not a secondment but rather was a permanent appointment to a classified position.

49. Mr. Edwards had been put in place as acting Team Manager in the fall of 1984, approximately a year after Mr. Frawley. On March 31, 1988, Mr. Edwards brought a grievance that was similar to Mr. Frawley's second grievance. Mr. Edwards settled his grievance by accepting retroactive pay at Level 18 back to December 1, 1985 which is the approximate time at which the positions were slotted at the AM-17 level and formal acting appointments were made.

50. Mr. Hewitt offered Mr. Frawley the same settlement that Mr. Edwards had accepted. Mr. Frawley refused, however, because the offer did not resolve his acting status and did not compensate him at the AM-18 level from the point of the commencement of his job in October of 1983 to December 1, 1985.

51. On July 11, 1988 Mr. Frawley filed the instant complaint before the Tribunal. It is the position of the Union that the filing of the complaint before the Tribunal further hardened COMSOC's response to Mr. Frawley's efforts to seek redress through the statutory process.

52. On August 12, 1988, Mr. Frawley's second grievance was heard by the Grievance Settlement Board (File No. 175/88). By a decision dated June 15, 1989, the Grievance

Settlement Board accepted the preliminary objection of COMSOC and ruled that it did not have jurisdiction to entertain the grievance if it related exclusively to a classification challenge of a managerial position held on an acting basis by a member of the bargaining unit. The Grievance Settlement Board remained seized, however, in the event that an issue remains in the grievance with respect to which the Board does have jurisdiction.

53. In November of 1988, after Mr. Frawley's complaint with the Tribunal was filed, a re-organization of the Community Services area of the ORC was announced. In November of 1988, Mr. Munn moved back to the ORC in a newly-created management position from his Team Manager job. Mr. Connell, the Director of Community Services for the ORC, left the Community Services area. In the fall of 1988, a new Assistant Administrator was brought in, Ms. Carol Orphanacos. According to Mr. Fenlon, Ms. Orphanacos assumed many of Mr. Connell's duties as Director of Community Services.

54. Before Ms. Orphanacos was appointed, Mr. Hewitt decided to eliminate the three Team Manager jobs and to replace them with the single position of Coordinator of Community Service Teams. At a meeting on November 15, 1988, Ms. Orphanacos advised the community service teams that the Team Manager positions would be discontinued. Mr. Edwards had come from a management position as a social work supervisor and subsequently reverted to that position. Mr. Frawley, however, had come from an entry level bargaining unit position as a Psychometrist 2 (Masters) and had to return to that level.

55. In March of 1989, Mr. Frawley's acting Team Manager position ended and he accepted a secondment in the position of Psychometrist 2 (Masters) to the Bluewater Centre for Young Offenders. The Bluewater Centre is operated by the Ministry of Correctional Services and is in the Goderich area where Mr. Frawley lives. Mr. Edwards remained for a time as acting Team Manager in Woodstock. Mr. Frawley's secondment to Bluewater extended until September of 1990, at which point he returned to the ORC as a Psychometrist 2 (Masters) in the bargaining unit. At Bluewater, Mr. Frawley was paid at the AM-17 level until November 20, 1989, when the new Co-ordinator of Community Services Teams was put in place and, presumably, the Team Manager jobs were officially terminated. His pay was then cut to the Psychometrist 2 (Masters) level.

56. The newly created single position of Co-ordinator of Community Service Teams (later, Director of Community Service Teams), which took the place of the three Team Managers, was posted on October 26, 1989. Mr. Bob Carey, who had supervised Mr. Frawley for clinical purposes, applied for and obtained the position. The Union argues that the decision of Ms. Orphanacos to make certification as a registered psychologist one of the requirements of the position was done, not for legitimate reasons relating to the requirements of the position, but rather as a device to exclude Mr. Frawley from eligibility for the position.

57. **The Tribunal has carefully reviewed all of the evidence respecting the creation of the job of Co-ordinator of Community Service Teams and its prerequisite of registered**

psychologist certification. The Tribunal cannot find that the Respondent's handling of this posting, including the creation of the position requirements, constitutes a breach of the Act.

58. When Mr. Frawley's secondment to the Bluewater Centre for Young Offenders expired in September of 1990 and he returned to the ORC as a Psychometrist 2 (Masters) in the bargaining unit, he was given the choice of working in either Woodstock or London. Mr. Frawley opted to go to London and report to Dr. Carey. This location, however, necessitated a round trip of 188 kilometre per day between the London office and his home near Goderich.

59. Pursuant to the Ministry's polices, Mr. Frawley was offered a travel allowance for a thirty day period, from September 15 to October 30, 1990, as well as a Home Relocation package which generally provides an employee with the entitlement to move closer to his or her place of work when he or she lives more than 40 kilometres away. It also includes the option of a guaranteed sale plan for the employee's house if he or she decides to move. This option, however, involves time limits. By a letter dated October 12, 1990, which was received by the Ministry on October 29, 1990, Mr. Frawley requested that the Ministry continue his mileage allowance until such time as a relocation of his home residence, if deemed appropriate, would take place. In addition, he had requested an extension of the deadline for making a decision about relocation until after the Tribunal issued its Decision in the instant matter. He did not want to forgo the benefits of the guaranteed house sale

plan but, at the same time, he was not ready, in all the circumstances of this matter, to make a decision on whether to re-locate in London.

60. By an Interim Order made on October 29, 1990, the Tribunal, on the consent of the parties, held that Mr. Frawley would not be required to make a decision on relocation until the conclusion of the instant proceeding. Notwithstanding the Tribunal's Consent Order extending the time within which Mr. Frawley would be required to make a decision on re-location, the Ministry, effective November 1, 1990, cut off his travel allowance.

61. The issue of travel allowance was not expressly addressed by the parties in respect of the Tribunal's Order extending the time frame for decisions under the Home Relocation Plan. Counsel for the Ministry states, however, that when the Ministry agreed to the Tribunal's Order extending the Home Relocation time limit, it believed that it would have no cost consequences. The Ministry submits that the extension of travel allowance was not a part of the Tribunal's Order. The Union, on the other hand, asserts that extending the travel allowance was an integral part of the Tribunal's Order respecting an extension of the Home Relocation time limits and that the Ministry's withdrawal of the travel allowance is a further reflection of discrimination against Mr. Frawley in violation of the **Act.**

62. At the Tribunal's hearing on October 22, 1991, the Tribunal directed COMSOC to pay Mr. Frawley travel allowance for his travel from Goderich to London until the final Decision in this matter has issued. It was understood that in its final Award the Tribunal

would determine whether Mr. Frawley was entitled to the travel allowance and that if it was determined that he was not, he would reimburse the Ministry.

63. Having carefully reviewed the submissions of the parties, the Tribunal finds that an inherent part of its Order made on October 29, 1990 to extend the time by which Mr. Frawley would be required to make a decision on Home Relocation included an extension of the related travel allowance. To extend the period of time within which Mr. Frawley would be required to make a decision on whether to relocate his home to London, would be a hollow entitlement if he was required, at the same time, to pay his own travel expenses during the interim period. Being required to pay his travel expenses could reasonably force Mr. Frawley to relocate, notwithstanding the extension, because of the financial strain of the daily 188 kilometre trip. **Accordingly, we are satisfied that the extension of the travel allowance was an integral part of the extension of the Home Relocation time limit, and, in the circumstances, should reasonably have been understood as such**.

64. The Union asserts that discrimination against Mr. Frawley continued upon his assumption of duties at the London office of the ORC. Mr. Frawley maintains that he has been under employed and ignored. His normal caseload would be approximately 10 ongoing cases; at the London office he has had approximately 2.

65. In addition, the Union asserts that Mr. Frawley was further discriminated against in the fall of 1990 when Ms. Orphanacos appointed Mr. Dale Munro, on an acting basis, to a

management position on the Community Service Team at the London office. Mr. Frawley was upset by the appointment because he thus believed that Ms. Orphanacos would do nothing to help him regain a management position. The Union raised the appointment of Mr. Munro to attack the credibility of Ms. Orphanacos. The Union asserts that Ms. Orphanacos was not forthright with the Tribunal because when she testified on June 22, 1990, she spoke only about the decision of the ORC to have a single head to the Community Service Teams, Mr. Bob Carey, and did not mention that a local site manager, Social Work Supervisor, would be put in the London area office on an acting basis.

66. **The Tribunal has carefully reviewed the evidence regarding Mr. Munro's appointment and is not prepared to conclude that Ms. Orphanacos attempted to mislead the Tribunal in her testimony or that she breached the Act in any way**.

67. Counsel for the Union asserts that the Ministry's treatment of Mr. Frawley has sent a chilling message to others who may decide to use the grievance procedure and points to Mr. Munro by way of example. Counsel maintains that Mr. Munro appeared very nervous as a witness and clearly did not want to be drawn into the Frawley dispute. Counsel submits that Mr. Munro was obviously afraid he would be tainted with the Frawley case and that his career would become as dead as Mr. Frawley's. Counsel asserts that another example of the chilling effect is the evidence of Mr. Edwards that the only reason he settled his grievance and accepted management's offer was because he could not afford a lawyer to

fight his case. Counsel for the Union argues that unless COMSOC is checked by this Tribunal, it will inevitably deter others from exercising their statutory rights under the **Act**.

B. DECISION RESPECTING REMEDY:

For the reasons detailed above, the Tribunal has determined that the management of the ORC breached section 29 (2) of the **Act** by discriminating against Mr. Frawley for exercising his rights under the **Act** and by seeking, by intimidation, to compel him to refrain from exercising his rights under the **Act**. Mr. Blake breached the **Act** by writing Mr. Frawley a letter of personal condemnation in April of 1986 for the settlement of his first grievance. Mr. Fenlon breached the **Act** through his personal attack on Mr. Frawley at an ORC meeting in February of 1987. We have concluded that this attack was motivated by antagonism against Mr. Frawley which was generated by the exercise of his rights of grievance under the **Act**. Finally, the Tribunal has concluded that Mr. Hewitt breached the **Act** when he refused to appoint Mr. Frawley to a permanent position of Team Manager. We have concluded that his refusal was motivated by retaliation against Mr. Frawley for his having exercised his rights of grievance under the **Act.**

These breaches of the **Act** were related to one another in that, we conclude, they fed off each other and, thereby, extended the **animus** against Mr. Frawley. For the reasons detailed above, the Tribunal is satisfied that but for Mr. Frawley having filed and settled his

grievance for a claim of retroactive pay at the AM-17 level back to October 1983, management at ORC would have brought his acting status to an end within the outside time limit of one year generally anticipated under the government's guidelines for acting positions. But for the breach of the **Act**, we conclude, Mr. Frawley would have been permanently appointed to the management position of Team Manager which would have lasted until November 1989 or another 3 years.

The basic principle applicable to determining a remedy for Mr. Frawley is to try, as closely as possible, to put him in the position he would have been in but for the Ministry's breach of the **Act**.

Having carefully evaluated the circumstances of the breach of the **Act** and the submissions of the parties on remedy, the Tribunal directs the following:

1. The Tribunal directs that **Mr. Frawley's personnel and other relevant records be amended to reflect for Mr. Frawley a permanent appointment to the Team Manager position as of October 17, 1983**, when he started performing that job, and continuing **until on or about November 20, 1989**, when the Team Manager positions were discontinued and the new Co-ordinator of Community Services Teams was put in place.

2. The Tribunal directs that Mr. Frawley's personnel and other relevant records be amended to reflect the full text of the instant Decision and the apology referred to below;

3. The Tribunal declines the Union's request to appoint Mr. Frawley to a managerial position.

4. The Tribunal directs that Mr. Frawley be **compensated for the lost opportunity** that has occurred in his career. But for the breach of the **Act**, Mr. Frawley would have been declared surplus from a management position sometime between November of 1988 and November of 1989. He would have been put on a management surplus list with a right to exercise priority in accordance therewith, instead of reverting to his bargaining unit classification of Psychometrist 2 (Masters) and being required to exercise his rights from there.

The Tribunal concludes that the **compensation for that lost opportunity should be measured by the current difference between the AM-17 maximum pay level and the rate for the Psychometrist 2 (Masters)**, which he actually received, for all hours paid. Level AM-17 is the level at which we conclude Mr. Frawley reasonably could have expected to have been paid in a replacement job since the Team Manager job was classified at the AM-17 level, notwithstanding that Mr. Munn and Mr. Edward (through his settlement) were paid at the AM-18 level. We further conclude that this **compensation for lost opportunity should extend for a three year period**. Three years, we find, is a rough approximation of the period of time that might reasonably be required for Mr. Frawley to overcome the set back to his career resulting from the breach.

5. From the outset of his appointment to the Team Manager position, Mr. Munn was paid at the AM-18 level for the same job Mr. Frawley performed. Mr. Edwards, through the settlement of his grievance, was also paid at the AM-18 level effective December 1, 1985. The justification that was given by the Ministry for paying Mr. Munn at the AM-18 level, but not Mr. Frawley, was that Mr. Munn was on secondment. For reasons set out above, the Tribunal has concluded that Mr. Munn was appointed outright to the position and was not seconded. Accordingly, the Tribunal has been made aware of no justifiable reason for Mr. Frawley to be paid in a lower classification than Mr. Munn and Mr. Edwards for doing the same work. Accordingly, respecting **salary loss**, and in the absence of an acceptable justification for the differentiation, the Tribunal directs the Ministry to compensate Mr. Frawley at the same AM-18 level paid to Mr. Edwards, retroactive to October 1983.

6. The Tribunal directs that COMSOC deliver a **written apology** to Mr. Frawley, the form and content of which will be agreed to by the parties, or failing which, will be determined by the Tribunal. The Tribunal declines the Union's request to have the apology published throughout the Southwest Region of COMSOC.

7. Respecting **Travel Allowance**, and pursuant to the Tribunal's finding that the extension of the travel allowance was an integral part of the Tribunal's Order of October 29, 1990, the Ministry is directed to compensate Mr. Frawley for his travel expenses from his home in or around Goderich to his work location in London from November 1, 1990 to

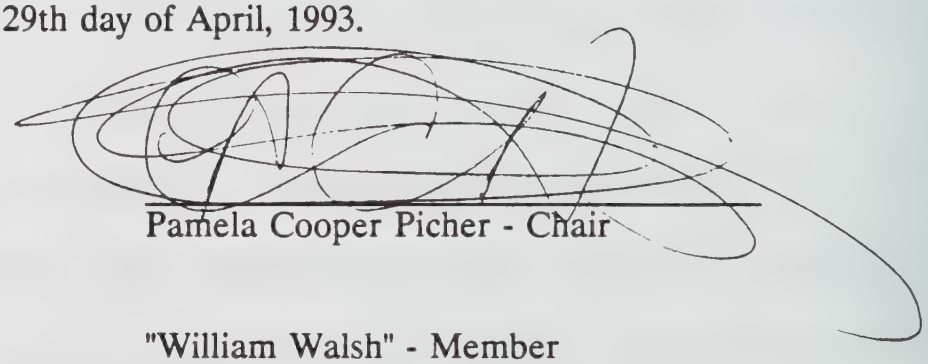
October 21, 1991, when, by the further Order of the Tribunal, the Ministry resumed the payment of the travel allowance.

8. The Tribunal directs that the **time limit for decision by Mr. Frawley under the Home Relocation Plan and related expiry of the travel allowance shall start to run from the date of the implementation of the instant Decision**.

9. The Tribunal directs the payment of appropriate **interest** on compensation payable under this Decision and that it be calculated according to the basic principles set out in the **Hallowell House** decision of the Labour Relations Board of Ontario. The Tribunal leaves the precise calculations to the parties.

The Tribunal remains seized of this matter for the purposes, among others, of resolving any disputes respecting compensation and the implementation of this Decision.

DATED at Toronto this 29th day of April, 1993.



Pamela Cooper Picher - Chair

I CONCUR "William Walsh" - Member

I CONCUR "Jack Coups" - Member

Ontario Public Service Labour Relations Tribunal
Fonction Publique de l'Ontario Tribunal Administratif des Relations du Travail

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T/0016/88

CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

R.S.O. 1980, c. 108

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

Between:

Ontario Public Service Employees Union

Complainant

- and -

The Crown in Right of Ontario
(Ministry of the Environment)

Respondent

Before:	J.H. Devlin	Vice-Chairperson
	M. Sullivan	Member
	R. Redford	Member
For the Complainant:	P. Lukasiewicz Counsel Gowling & Henderson Barristers & Solicitors	
For the Respondent:	T. Sargeant Counsel The Institute	
Hearings:	December 9, 1988 April 20, 1989	

In the complaint which was filed on behalf of David Bell, it is alleged that the Ministry violated Section 29(2)(a) of the Crown Employees Collective Bargaining Act which is to the following effect:

> 29(2) The employer or any person acting on behalf of the employer shall not,
>
> (a) refuse to employ or to continue to employ or discriminate against a person with regard to employment or any term or condition of employment because the person is exercising any right under this Act or is or is not a member of an employee organization.

In particular, the Union contends that the Ministry discriminated against Mr. Bell with regard to a term of his employment because he exercised a right under the Act.

The material facts are not in dispute. In April of 1981, the Complainant began working as a Water Well Inspector in the Northeastern Region and specifically, in Sudbury. As a Water Well Inspector, the Complainant was classified as an Environmental Technician III and reported to the Hydro-Geologist who in turn reported to the Chief, Water Resources Unit. The Chief, Water Resources Unit reported to the Manager, Technical Support Section, Jim Fry, who reported to the Regional Director, Northeastern Region. In 1981, the Regional Director was Mr. McIntyre and in 1982, Bill Gibson assumed this position.

As a Water Well Inspector, approximately 50% of the Complainant's time was devoted to the Water Well Programme and of this, a significant portion involved processing applications for Permits To Take Water under the Ontario Water Resources Act. Section 20 of that Act provides that no person shall take more than 50,000 litres of water in a day without a Permit issued by a Director. Section 4(1) of the Act provides for the appointment of Directors and contains the following:

> 4.-(1) The Minister shall appoint in writing such employees of the Ministry or, subject to the approval of the Lieutenant Governor in Council, such other persons as he considers necessary as Directors in respect of such sections of this Act and in respect of such of the regulations or sections thereof as are set out in the appointments.

A Director appointed under the Ontario Water Resources Act need not be the Regional Director and, as provided in section 4, a Director can be any employee of the Ministry or such other persons as are considered necessary. Persons appointed as Directors under section 4 are given authority with respect to particular sections of the Act and although it appears that bargaining unit employees have been appointed Directors, no member of the bargaining unit is a section 20 Director; that is, a Director with authority to issue Permits To Take Water under section 20 of the Ontario Water Resources Act.

In 1981, when the Complainant began work as a Water

Well Inspector, Mr. McIntyre was the section 20 Director for the Northeastern Region and in 1982, he was replaced by Mr. Gibson.

Between 1981 and 1983, applications for Permits To Take Water were received and reviewed by the Complainant who circulated them to the appropriate individuals and agencies. The Complainant then decided whether a Permit would be issued in each case and, in this respect, Permits could be issued with standard conditions, often referred to as routine Permits, or with special conditions. In any event, whether a routine Permit or a Permit with special conditions was to be issued, the Complainant issued the Permit by affixing to it a stamp which he had been provided with the signature of the section 20 Director. Permits were not, therefore, reviewed or approved by the individual actually appointed under the Ontario Water Resources Act.

In 1983, the Complainant became concerned about the legitimacy of his issuing Permits using the stamp of the Director when these Permits were not, in fact, being seen by the Director. As a consequence, the Complainant sought an opinion from the Legal Services Branch and was advised that he could continue to issue routine Permits as he had done in the past but that Permits with special conditions should be signed by the section 20 Director. From that point on, the Complainant met with Mr. Gibson whenever a Permit with special conditions was to be issued. The Complainant testified that Mr. Gibson signed each

Permit and never altered in any material way any Permit which the Complainant placed before him. In 1985 or 1986, Mr. Fry was also appointed a section 20 Director in order that Permits could be issued in the absence of Mr. Gibson and the Complainant testified that Mr. Fry followed exactly the same procedure as Mr. Gibson.

In the fall of 1986, an Approvals and Planning Unit was created in the Technical Support Section of the Northeastern Region and in January of 1987, the Complainant began working in this Unit as a Technical Approvals Evaluator. In this capacity, the Complainant reported to Claude Lafrance, who had been appointed Chief of the Approvals and Planning Unit in December of 1986. Mr. Lafrance reported to Mr. Fry who continued to report to the Regional Director. In February of 1988, Ronald Hore became Acting Regional Director.

As Technical Approvals Evaluator, the Complainant continued to issue Permits To Take Water as he had done as a Water Well Inspector. There was, however, no job specification for the newly-created position of Technical Approvals Evaluator and throughout 1987, there were discussions between the Complainant and Mr. Lafrance as to when a job specification would be available. In November of 1987, the Complainant was advised that on the basis of his job duties, it was the Ministry's view that he was appropriately classified as an Environmental

Technician III. As a result, Mr. Bell filed a grievance contesting this classification.

In December of 1987, Mr. Lafrance provided to the Complainant a draft specification for the position of Technical Approvals Evaluator which provided that 30% of the incumbent's time was to be spent evaluating, co-ordinating and processing applications for Permits To Take Water. In particular, the specification provided that the Technical Approvals Evaluator was responsible for screening applications for such Permits and for "recommending to the Supervisor for or against approval".

On February 29, 1988, at a step 2 meeting held to deal with the Complainant's classification grievance, Mr. Malette, the President of the Local, took the position that the job specification provided by the Ministry did not accurately reflect the Complainant's job duties. In support of this position, Mr. Malette submitted that, in issuing Permits To Take Water, the Complainant worked virtually independently as evidenced by the fact that he had a stamp with the signature of the section 20 Director. Mr. Malette also pointed out that in respect of Permits with special conditions, the Complainant dealt directly with superiors of his immediate supervisor.

Mr. Hore was one of the persons who attended the meeting on February 29, 1988 and he testified that this was the

first time he became aware that the Complainant was stamping the Director's signature on Permits To Take Water. Mr. Hore was concerned about this practice as a result of which, he instructed Mr. Lafrance to obtain an opinion from the Legal Services Branch on the validity of Permits which were not signed by a section 20 Director. The opinion was provided by Jim Jackson Q.C., a solicitor with the Ministry and was to the effect that it was necessary for a section 20 Director to turn his mind to each Permit which was issued and in the event that he did not do so, the conditions attached to the Permit would not be enforceable.

As a result of the opinion obtained, Mr. Hore instructed Mr. Lafrance to advise the Complainant that Permits To Take Water could no longer be issued using a stamp of the Director's signature. Mr. Lafrance, therefore, directed the Complainant to present routine Permits to the section 20 Director for signature and he requested that contentious Permits or those requiring special conditions be reviewed with him personally. Although this latter procedure had not been followed previously, Mr. Lafrance explained that he was responsible to ensure that Permits To Taker Water were validly issued; that he was Mr. Bell's immediate Supervisor, and that he believed it was necessary to have a proper reporting system.

Finally, in May of 1988, Mr. Lafrance presented to the Complainant a revised job specification for the position of

Technical Approvals Evaluator. This specification provided that 25%, rather than 30%, of the incumbent's time was to be spent processing applications for Permits To Take Water. Reference to making a recommendation to the "Supervisor" was also removed and the specification simply provided that the incumbent was responsible for "recommending for or against approval".

It was the submission of Mr. Lukasiewicz, on behalf of the Union, that the Ministry altered the Complainant's job duties relating to Permits To Take Water because Mr. Bell exercised a right under the Act; that is, he filed a grievance claiming that he was improperly classified. Mr. Lukasiewicz contended that having obtained an opinion that Permits To Take Water could not be issued with the stamp of the Director, it was open to the Ministry to have Mr. Bell appointed a section 20 Director in order that he could continue to issue Permits as he had done in the past. Having chosen instead to remove from the Complainant those duties which supported his claim for reclassification, Mr. Lukasiewicz submitted that it must be inferred that management intended to adversely affect the outcome of the Complainant's classification grievance. This, it was contended, was in violation of section 29(2)(a) of the Crown Employees Collective Bargaining Act and Mr. Lukasiewicz requested that by way of relief, we direct the Ministry to return to Mr. Bell the duties he performed previously.

It was the submission of Mr. Sargeant, on behalf of the Ministry, that in removing the duties in issue, the Employer was not seeking to adversely affect Mr. Bell's classification grievance but was acting pursuant to legal advice that the conditions on Permits which were stamped with the signature of the Director would not be enforceable. Mr. Sargeant contended that the Ministry was not required to appoint the Complainant a section 20 Director and it was submitted that the Ministry did not engage in any conduct proscribed by the Crown Employees Collective Bargaining Act. Mr. Sargeant requested, therefore, that the Complaint be dismissed.

In this case, there was some dispute between the parties as to whether the removal of the duties in question will adversely affect the outcome of Mr. Bell's classification grievance. Although the Ministry took the position that it will not, this is properly a matter for the Grievance Settlement Board before which Mr. Bell's grievance is pending. The issue before the Tribunal is whether the Ministry discriminated against the Complainant with regard to a term or condition of his employment because he filed a grievance, thereby exercising a right under the Crown Employees Collective Bargaining Act. In addressing this issue, we agree with the Union that seldom will the intention to discriminate be admitted and that reasonable and necessary inferences can and should be drawn from the evidence in order to assess the motivation of the Employer. Having done so

in this case, however, we can infer no improper motivation on the part of the Employer.

Mr. Hore assumed the position of Regional Director in January of 1988 and only in late February, did he become aware that certain Permits To Take Water were being issued with a stamp of the signature of the section 20 Director. Mr. Hore was concerned about this practice, a concern which had been shared by the Complainant himself some years previously. The legal opinion which was subsequently provided to Mr. Hore was to the effect that conditions on Permits stamped with the signature of a section 20 Director, to which the Director did not turn his mind, would not be enforceable. The Ministry responded to this opinion by requesting that the Complainant return the stamp of the section 20 Director and that he discontinue issuing routine Permits To Take Water as he had done in the past.

In our view, the evidence establishes that this action was taken, not "because" Mr. Bell had filed a grievance, but "because" of the legal opinion given by Mr. Jackson, an opinion which was not challenged before the Tribunal. The action was taken to ensure the validity of Permits issued under section 20 of the Ontario Water Resources Act and there was, we find, a legitimate business purpose for the action which was wholly unconnected with the filing of a grievance by Mr. Bell.

We are also unable to draw any adverse inference from the fact that Mr. Lafrance requested that contentious Permits or those with special conditions be reviewed with him personally. At the time this request was made, an issue had been raised with regard to the validity of certain Permits To take Water. The validity of these Permits was the responsibility of Mr. Lafrance who sought to ensure that he was more fully informed about the procedures being followed. Mr. Lafrance also explained that he had not previously had an opportunity to put a proper reporting system in place.

The final matter which must be addressed relates to the Union's suggestion that in the face of Mr. Jackson's opinion, the proper course would have been to appoint Mr. Bell a section 20 Director. The fact that the Ministry did not do so, however, does not lead us to infer that the Ministry intended to adversely affect the classification grievance. The appointment of section 20 Directors is a matter within the discretion of the Minister of the Environment and the evidence reveals that no other member of the bargaining unit has received such an appointment.

In the result, it has not been demonstrated that the Ministry engaged in conduct proscribed by section 29(2)(a) of the Crown Employees Collective Bargaining Act and the complaint of Mr. Bell is hereby dismissed.

DATED AT TORONTO, this 23rd day of June, 1989.

J.H. Devlin, Vice-Chairperson

M. Sullivan, Member

R. Redford, Member

Ontario Public Service Labour Relations Tribunal
Fonction Publique de l'Ontario Tribunal Administratif des Relations du Travail

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T/0018/88

CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

R.S.O. 1980, c. 108

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

Between:

J. Suppa

Complainant

- and -

Canadian Union of Public Employees
Local 767

Respondent

- and -

Ministry of Housing

Intervenor

Before:	M.G. Mitchnick	Alternate Chair
	K. McDonald	Member
	J. Coups	Member
For the Complainant:	C. Abbass Counsel Barrister & Solicitor	
For the Respondent:	R. Carnovale National Representative CUPE, Local 767	
For Intervenor:	A. Tarasuk Counsel The Institute	
Hearings:	December 13, 1988 April 26, 1989	

DECISION

This is a complaint under section 32 of The Crown Employees Collective Bargaining Act alleging that the respondent trade union has acted in contravention of section 30 of the Act. Section 30 provides:

> "An employee orgainization shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees, whether members of the employee organization or not." R.S.O 1980,c.108,s.30

The complainant, Joseph Suppa, was an employee of the Ministry of Housing. The Ministry terminated his employment on June 16, 1986. Mr. Suppa's complaint arises out of the failure of the respondent Union to file a grievance on his behalf. He argues further, that, even if his grievance was out of time, the Union should have attempted to obtain an extension of the time limits from the Ministry, as permitted by the collective agreement. It is this failure of the Union to act which Mr. Suppa says is a breach of the Union's duty of fair representation. He complains that the Union acted arbitrarily and discriminatorily and treated his case in a "summary and perfunctory manner".

At the outset of the Hearing the Union Representative and Counsel for the Ministry both requested that the Tribunal dismiss Mr. Suppa's complaint on the basis of delay. They agreed that the Tribunal could reserve on the preliminary matter and proceed to hear the case on its merits.

In support of his complaint that the Union failed in its duty to represent him, Mr. Suppa was the only witness. He testified that he received the letter of termination and subsequently tried to reach the Union by phoning a Shop Steward. He could not recall the name of the Steward. He testified that he phoned the Steward two times at work, left messages, but received no reply. He finally went to speak to the Steward in person and told him he'd been fired. The Steward said he would "do something about it". Mr. Suppa said he waited about 15 days and then telephoned the Union President, Mr. George Mammoliti, ultimately meeting with him once. Mr. Suppa said that when he told the Union President about his dismissal, Mr. Mammoliti replied that it was too late to put in a grievance. Mr. Suppa said that he told the Union President about his earlier conversation with the Shop Steward. Mr. Mammoliti replied that "we're past the five days (in the contract), there is nothing we can do; we're just wasting our time". Mr. Suppa said the conversation lasted about 15 minutes and also touched on other issues including his right to claim long term disability.

Mr. Suppa told us he subsequently contacted several lawyers. None of them filed a grievance on Mr. Suppa's behalf nor was any complaint filed against the Union until December 1987, fifteen months after Mr. Suppa's final contact with the Union President. Mr. Suppa gave us no explanation for the delay in the filing of the complaint.

For its part, the Union called two witnesses, Mr. Sam Nasso, Secretary-Treasurer of the Union and Mr. George Mammoliti, the President of the Local.

According to Mr. Mammoliti, Mr. Suppa approached him in mid-August of 1986 in a parking lot and asked him what to do about his termination. Mr. Mammoliti recalled that he asked Mr. Suppa some questions about the termination and asked him whether or not he wanted the Union to file a grievance on his behalf. Mr. Suppa replied that he did not know what he wanted to do about the termination as he had a business and was seeking advice from a lawyer. Mr. Mammoliti said that he told Mr. Suppa to come and see him if he wanted to put in a grievance. Mr. Mammoliti said Mr. Suppa did not tell him he had already spoken to a Shop Steward and asked for a grievance to be filed. He testified that the next he heard from Mr. Suppa was a letter from Mr. Suppa's lawyer.

On cross-examination, Mr. Mammoliti agreed that he did tell Mr. Suppa there might be a problem with the grievance as it was out of time. But he added that he'd made it clear to Mr. Suppa that he would file a grievance if requested to do so. According to Mr. Mammoliti, Mr. Suppa never made that request.

Leaving aside for a moment the question of the preliminary objection based on delay, the Board would like to make some comments on the merits of the complaint. There are fundamental

difficulties with the testimony of the complainant. There are glaring and repeated inconsistencies between the orginal complaint contained in the letter of December, 1987 and the testimony of Mr. Suppa in Chief, and further differences between the testimony of Mr. Suppa in Chief and his testimony when called in Reply. Mr. Suppa was never consistent on whether he contacted someone first by phone or in person or where he called or met them or when. In areas which were crucial to the proof of his complaint, such as his assertion that he made an initial complaint to a Shop Steward immediately on receipt of the letter of termination, he asserted that he was driven or drove to see the man in question, who was never identified, with a co-worker. Yet that co-worker, whose corroborating testimony was crucial, was not called to testify (notwithstanding the lenghthy break between hearing days). For these reasons we find ourselves unable to give weight to the testimony of Mr. Suppa, at least in so far as it contradicts the more consistent evidence given by Mr. Mammoliti, as to what was said in their meeting in August of 1986.

That problem with Mr. Suppa's evidence underscores the concerns that tribunals have in general about delay in the bringing of complaints. Memories fade, dates become confused and conversations blend together. Even interested parties, such as Mr. Suppa, cannot recall names, dates or sequences with the accuracy necessary to sustain their position. It is scarcely necessary to point out that parties for whom these events bear

no special significance at the time are at an even greater loss when they are expected to recollect their part in events.

Mr. Suppa gave no explanation for the delay of some fifteen months in making his complaint. While the Tribunal is not disposed to be unrealistically technical in the burden it places on an individual employee, one must conclude that, at some point, Mr. Suppa would know or should have known that time is of the essence in matters of this nature. Indeed, Mr. Suppa is no newcomer to the arbitration and grievance process, having successfully grieved an earlier termination through the Union, and any plea of ignorance cannot be sustained.

For all the of reasons given, the Tribunal finds itself compelled to dismiss Mr. Suppa's complaint.

Dated at Toronto this 8th day of Sept., 1989.

M. Mitchnick, Alternate Chair

K. McDonald, Member

J. Coups, Member

Ontario Public Service
Labour
Relations
Tribunal

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T/0025/88

THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

R.S.O. 1980, c.108

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

Between:

Selma E. Schachner

Complainant

and

CUPE Local 1750 & Carol Haffenden

Respondents

Before:

M. Mitchnick - Alternate Chairperson
M.J. Sullivan - Member
W.J. Madigan - Member

For the Complainant: Selma E. Schachner herself

For the Respondents:

L.A. Richmond, Counsel
C. Haffenden, President
W. Korth, Vice-President
J. Bruce, Chief Steward

Hearing: January 12, 1989

Decision

This is a complaint under section 32 of the Crown Employees Collective Bargaining Act, alleging that the complainant, Selma Schachner, has been dealt with by the respondent Local Union and its President, Carol Haffenden, contrary to the provisions of sections 29 (3) and 30 of the Act.

The complaint centres around what in general terms may be described as the removal of the complainant by the Union from her position as a Union representative on the joint Job Evaluation Committee under the collective agreement.

The respondents argued by way of preliminary motion that the complaint ought to be dismissed, as disclosing no prima facie case under the Act, and that the recourse of the complainant, if any, lay under the normal Appeal procedures provided by the Union's Local and National constitutions.

Following the parties' representations with respect to the respondents' preliminary motion, the complainant indicated that it was her intention to pursue new rights of appeal within the Union, and advised the Tribunal that she wished the complaint before it to be withdrawn. The respondents declined to agree to the complaint being "withdrawn", and argued instead that, given the stage the proceedings had reached, the matter ought to be dismissed. The Tribunal indicated to the complainant that the Tribunal had the choice of rendering a decision on the

preliminary motion brought by the respondents, or dismissing the matter on consent. The complainant advised the Tribunal that she would consent to the dismissal.

The complaint is accordingly dismissed on consent.

Dated at Toronto, Ontario, this 21st day of February, 1989.

M. Mitchnick
Alternate Chairperson

M. Sullivan, Member

W. Madigan, Member

Ontario Public Service Labour Relations Tribunal
Fonction Publique de l'Ontario Tribunal Administratif des Relations du Travail

180 Dundas Street West, Suite 2100, Toronto, Ontario M5G 1Z8 416/598-0688

Crown Employees Collective Bargaining Act
R.S.O. 1980, c. 108

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

T/0026/88

BETWEEN: Ontario Public Service Employees Union, Local 508

Complainant

- and -

The Crown in Right of Ontario
(Ministry of Government Services et al)

Respondent

Before: J.H. Devlin Vice-Chairperson
M. Sullivan Member
C. Boettcher Member

For the Complainant: M. I. Rotman
Counsel
Rotman, Zagdanski
Barristers and Solicitors

For the Respondents: R. W. Little
Counsel
Hicks Morley Hamilton Stewart Storie
Barristers and Solicitors

Hearing: January 2, 1990

In this Complaint which was filed by the Union, it is alleged that the Ministry of Government Services and certain named Respondents, who are members of management, refused Jim Glenny a secondment to the Leasing Services Branch because of his Union activity. To this extent, it is said that the Respondents violated Section 29 of the Crown Employees Collective Bargaining Act. Although the formal Complaint also makes reference to a petition which was circulated in fall of 1986, this petition is the subject of another Complaint pending before the Tribunal. The parties agreed, therefore, that the petition would not be considered in the context of the present Complaint.

Mr. Glenny has been employed by the Ministry of Government Services for approximately 13 years and in the spring of 1988 when the Complaint arose, he was working in the Property Administration Section. He was classified as a Real Estate Officer II and his job title was Property Administrator. In this capacity, Mr. Glenny was involved in leasing government property to the private sector. During the period from 1977 to 1988, Mr. Glenny was also President of Local 508 of the Ontario Public Service Employees Union. Mr. Glenny testified in the course of his duties as Local Union President, he was often forceful and unrelenting in his representation of employees and he described himself as somewhat of a thorn in the side of management.

In March of 1988, Mr. Glenny approached John Jackson, the Executive Director of the Property Management Division, to request a secondment to the Leasing Services Branch. In this Branch, employees are involved in leasing property from the private sector for the use of various government Ministries. The secondment sought by Mr. Glenny involved a lateral transfer in the same classification and was intended to enable him to broaden his experience. After speaking with Mr. Jackson about the secondment, it would appear that Mr. Glenny also raised the matter with his immediate Supervisor, Bob Wilson, the Manager of the Property Administration Section.

Mr. Wilson then spoke with Alex Way who at that time was the acting Director of the Leasing Services Branch. Mr. Way testified, however, that as the subject of a secondment for Mr. Glenny was only raised casually by Mr. Wilson, he did not understand that a formal request was being made at that time. Nevertheless, Mr. Way agreed that there is no application form for secondments and the evidence indicates that a request for secondment is generally made verbally by the employee to his Supervisor who in turn contacts the Supervisor in the Section in which the secondment has been requested.

In any event, when approached by Mr. Wilson in March of 1988, Mr. Way indicated that he did not believe that it would be appropriate for him to deal with the matter as a new Director was

being appointed to the Branch in early April. Mr. Way did advise Mr. Wilson, however, that he would inform the new Director of Mr. Glenny's interest in a secondment to the Branch. Mr. Way also testified that in the course of the discussion, Mr. Wilson indicated that the Property Administration Section did not have funds for the secondment. Mr. Way explained that funding for secondments is arranged by agreement of the Sections or Branches involved. In some cases, one or other of the two Sections pays the salary of the seconded employee while in other cases, both Sections share the cost.

On April 5, 1988, Delbert Jackson assumed the position of Director of the Leasing Services Branch and in the course of reporting to Mr. Jackson on the activities of the Section, Mr. Way advised him that he might be approached concerning a request for secondment by Mr. Glenny. Again, Mr. Way testified that it was not his understanding that a formal request for secondment had been made at that time. In any event, it was the evidence of both Mr. Jackson and Mr. Way that Mr. Way made no recommendation as to how the request for secondment ought to be dealt with, if one was forthcoming. In addition, although Mr. Way advised Mr. Jackson that Mr. Glenny was President of the Local, he said nothing about Mr. Glenny's relationship with management. Mr. Way explained that although Mr. Glenny had been forceful in his representation of employees, he had experienced no difficulty dealing with Mr. Glenny in the past.

In May of 1988, having heard nothing further with regard to his request for secondment, Mr. Glenny forwarded two memoranda to Mr. Wilson seeking a response to his request. Mr. Glenny testified that it was also at some point in May of 1988 that Mr. Wilson indicated to him that there were not sufficient funds for the secondment.

On May 30, 1988, Mr. Wilson forwarded a memorandum to Mr. Glenny indicating that he had discussed Mr. Glenny's request for secondment with Delbert Jackson. Mr. Wilson also provided Mr. Glenny with a copy of a memorandum from Mr. Jackson to all staff in the Leasing Services Branch indicating that secondments to the Branch would be deferred until June of 1989. This memorandum was to the following effect:

"...

MEMORANDUM TO: All Staff
Leasing Services Branch

RE: Review of Staff Secondments

Please be advised that A. Paull's secondment to the Western Ontario Region was recently extended for an additional three months. This decision prompted Leasing Services Branch Management to review the operational effects and advisability of further secondments at the present time.

To date, the review has highlighted the following concerns:

1. The increased number of leasing tasks and projects recently identified for the current fiscal year.

2. The resignation of five (5) experienced leasing agents within the past three (3) months.

3. The orientation and training of new staff.

4. The extended absence of an experienced leasing agent due to illness.

5. The ongoing obligation to deliver leased accommodation to client ministries on a timely basis.

With these concerns in mind, Leasing Services Branch Management concluded that secondment initiatives affecting the Leasing Services Section will be deferred until June, 1989. At that time, consideration will be given to a further review and assessment of secondment inquiries.

Your co-operation and assistance will be appreciated.

"Delbert L. Jackson"
Delbert L. Jackson
Director"

Mr. Jackson explained that in reviewing the advisability of secondments, he found that he did not have sufficient experienced staff. Existing staff were required to provide training and orientation to new employees being hired into the Branch on a permanent basis and there were not, therefore, additional staff members available to train seconded employees. Mr. Jackson also testified that the decision to defer secondments to June of 1989 was not related in any way to Mr. Glenny's request for secondment. In fact, a decision was subsequently made to further defer secondments to June of 1990.

Mr. Glenny testified, however, that in his view, management's refusal to grant his request resulted from anti-union animus. According to Mr. Glenny, other employees were granted secondments during the period in question. Although Mr.

Glenny also testified that he could not recall any other employee being denied a secondment, he acknowledged that, on occasion, employees have been advised that in light of the workload of a particular Section, their requests for secondments would be considered at a later date.

The issue, then, is whether in denying Mr. Glenny a secondment to the Leasing Services Branch, the Respondents acted in a manner contrary to Section 29 of the Crown Employees Collective Bargaining Act.

Having considered the evidence as a whole, we find that a violation of the Act has not been established. In reaching this conclusion, we reject the submission of the Complainant that there was some inconsistency between the statement of Mr. Wilson that there were no funds for the secondment and the fact that the Leasing Services Branch subsequently hired a number of permanent staff. As we understand it, Mr. Wilson was referring only to the funds available to the Property Administration Section and he was not purporting to speak of the funding available to the Leasing Services Branch. It is also to be noted that lack of funding on the part of the Leasing Services Branch was not one of the reasons relied upon by the Branch for deferring secondment initiatives.

Although Mr. Glenny testified that other employees were granted secondments during the period in question, there was no evidence of any secondments to the Leasing Services Branch after the spring of 1988. Moreover, in our view, there is no basis for rejecting the evidence of Mr. Jackson as to the reason for which secondments to the Branch were deferred until June of 1989 and subsequently, to June of 1990. Mr. Jackson was new to the Branch in April of 1988 and although he was advised by Mr. Way that Mr. Glenny was the President of the Local, there was no evidence that he knew anything of Mr. Glenny's relationship with management. In fact, it was only Mr. Glenny who suggested that the relationship was a difficult one.

Although Mr. Jackson acknowledged that he did not consider the extent to which Mr. Glenny required training or orientation in order to work in the Leasing Services Branch, it is evident that some training or orientation would have been necessary. Mr. Glenny, himself, admitted that he did not apply for the one of the posted vacancies for Leasing Agents because he recognized that he would not have been successful. In any event, even if there was some obligation to consider Mr. Glenny's experience in the Property Administration Section, it has not been established that management's failure to do so was prompted by Union activity on the part of Mr. Glenny. On the contrary, the evidence indicates that a decision was made by Mr. Jackson to defer all secondments to the Leasing Services Branch

for reasons relating to the work of the Branch and that this decision applied equally to the request for secondment made by Mr. Glenny.

In the result and for the reasons set out, the Complaint is hereby dismissed.

DATED AT TORONTO, this 20th day of February, 1990.

Jane H. Devlin - Vice-Chairperson

"M. Sullivan"
Member

"C. Boettcher"
Member

Ontario Public Service Labour Relations Tribunal
Fonction Publique de l'Ontario Tribunal Administratif des Relations du Travail

180 Dundas Street West, Suite 2100, Toronto, Ontario M5G 1Z8 416/598-0688

CROWN EMPLOYEES COLLECTIVE BARGAINING ACT, R.S.O. 1980, C.108

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

T/37/88

BETWEEN: Ontario Public Service Employees Union

(the "Applicant/Complainant")

AND: The Crown in the Right of Ontario
(Management Board of Cabinet)

(the "Respondent")

BEFORE:

Pamela C. Picher - Chair
E.C. Witthames - Member
J.A. Coups - Member

APPEARANCES

For the Union:

Paul Cavalluzzo - Counsel
Cavalluzzo, Hayes & Lennon
Barristers & Solicitors

For the Employer:

Chris Riggs - Counsel
Hicks, Morley, Hamilton, Stewart, Storie
Barristers & Solicitors

Hearings: February 20, 1989
April 3, 1989

Written submissions dated May 2, 3, 10, 19 and July 14, 1989 were received by the Tribunal.

DECISION

This is an application/complaint filed by the Union under section 40(2) of the **Crown Employees Collective Bargaining Act** (hereinafter referred to as "**C.E.C.B.A.**") which provides as follows:

> 40(2) If, in the course of bargaining for a collective agreement or during proceedings before a board of arbitration, a question arises as to whether a matter comes within the scope of collective bargaining under this Act, either party or the board of arbitration may refer the question to the Tribunal and its decision thereon is final and binding for all purposes.

Numerous proposals put forward by the Union in its current round of negotiations for Working Conditions and Employee Benefits have been objected to by the Employer as being excluded from collective bargaining by section 18(1) of **C.E.C.B.A.** The Union seeks a determination from the Tribunal as to whether its disputed proposals fall within the scope of collective bargaining as set out in section 7 of **C.E.C.B.A.**

In addition, the Union complains that the Employer has breached its obligation under section 8(2) of the **Act** to bargain with the Union in good faith. Section 8(2) stipulates the following:

> 8(2) The parties shall meet within fifteen days from the giving of the notice or within such further period as the parties agree upon and they shall bargain in good faith and make every reasonable effort to make a collective agreement.

We turn first to the issue of bargaining. The parties met to negotiate amendments to the Working Conditions and Employee Benefits Agreement on November 24, 1988 and January 4, 5, 25 & 26, 1989. On January 26th the Union broke off the negotiations to file the instant application/complaint before the Tribunal.

It is common ground that on January 25, 1989 the Employer tabled a proposal for the amendment of the sick leave provisions of the collective agreement. The Union argues that the Employer acted in breach of its duty to bargain in good faith by tabling its sick leave proposal on January 25, 1989 because, it contends, the Employer had confirmed to the Union on January 5th that it had no further proposals to present.

The evidence establishes that over the years the parties have developed a practice in negotiations by which each party at an early stage of negotiations will ask the other whether it has any further proposals to present. It is understood that once both parties indicate they have no further proposals a circumference is drawn around the negotiations. Naturally, though, counter proposals are an accepted and expected part of the bargaining process.

In this instance the Employer asked the Union after the initial exchange of proposals on November 24th whether it had any more proposals to present. The Union advised that it did. The additional Union proposal was presented at the next negotiating session on January 5, 1989; the Union then signified that it had no further proposals.

There is some conflict in the evidence concerning the parallel questioning of the Employer. Mr. Andy Todd, the coordinator of collective bargaining for the Union and

the chief union negotiator, testified that on January 5th he received a confirmation in the negative when he asked Mr. Richard Itenson, the head management negotiator (who occupies the position of Chief Staff Relations Officer with the Human Resources Secretariat), whether the Employer had any more proposals. In contrast, Mr. Itenson testified that Mr. Todd never actually asked him the question and thus, that the Employer never confirmed that it had no further proposals to present. Whether or not the question was formally asked, Mr. Itenson readily acknowledged that it would be inappropriate to introduce new proposals once bargaining has gotten underway. For the purposes of this complaint (although we make no finding of fact in this regard) the Tribunal will accept that the Employer confirmed to the Union on January 5, 1989 that it had no additional new proposals to present.

It was during the negotiating session on January 25, 1989 that the Employer first detailed its response to the Union's proposals. It is the position of the Employer that the sick leave proposal it put forward on January 25, 1989 was in the nature of a counter proposal to the Union's sick leave proposal and not a new proposal of its own. Among other matters, the Union's sick leave proposal requested an increase in existing benefits: it augmented the number of days off with full salary from 6 to 10 and it expanded the circumstances under which sick benefits would become payable, i.e. to include medical or dental appointments or job-related strain, in addition to sickness and injury. The Employer's sick leave proposal could be referred to as a "take away" in that it sought to decrease existing benefits. At the same time, though, it restructured the sick leave plan and set up a system designed to minimize short-term absences. Mr. Itenson testified that the Employer proffered this proposal to counter what it considered to be a very costly Union proposal. Mr. Itenson did not expect the Union to accept the Employer's first counter proposal. However, if changes were going to be

made to the sick leave provisions he hoped to negotiate a provision within the restructured framework advanced by the Employer.

Having carefully reviewed the evidence and submissions, the Tribunal readily concludes that the Employer has not failed in its duty to bargain in good faith. We are fully satisfied that the sick leave proposal advanced by the Employer at the negotiating session on January 25, 1989 was in the nature of a counter proposal. The proposal was presented during the meeting when the Employer first responded to the Union's proposals. Up until then each side had spoken only to its own proposals and answered questions of clarification concerning its own proposals. The Employer's proposal purports to take away existing sick leave benefits and in that sense may differ from a typical counter proposal that might normally fall somewhere between existing benefits and increased benefits proposed by a Union. However, it is clear in this instance that the Employer's disputed proposal would not have been advanced at all had the Union not first requested increased and expanded sick leave benefits. Moreover, the Employer's proposal sets up a different structure for sick leave benefits which renders direct comparisons between the status quo, the Union's proposed increases and the Employer's response less clear-cut.

The Tribunal concludes, in summary, that even if the Employer confirmed on January 5, 1989 that it had no new proposals to present, the sick leave proposal advanced by the Employer on January 25, 1989 was in the nature of a counter proposal, not a new proposal, and does not constitute bargaining in breach of the parties' traditional protocol or in breach of the parties' duty to bargain in good faith.

We turn now to the application under s.40(2) of **C.E.C.B.A.** to determine whether certain proposals advanced by the Union come within the scope of collective bargaining under the **C.E.C.B.A.** Section 7 of **C.E.C.B.A.** authorizes the Union to bargain with the Employer on terms and conditions of employment, some of which are expressly itemized. Section 7 then carves out from the scope of bargaining matters that are exclusively the function of the Employer, as set out in section 18(1) of **C.E.C.B.A.** Sections 7 and 18(1) provide as follows:

NEGOTIATION OF AGREEMENTS

7. Upon being granted representation rights, the employee organization is authorized to bargain with the employer on terms and conditions of employment, except as to matters that are exclusively the function of the employer under subsection 18(1), and, without limiting the generality of the foregoing, including rates of remuneration, hours of work, overtime and other premium allowance for work performed, the mileage rate payable to an employee for miles travelled when he is required to use his own automobile on the employer's business, benefits pertaining to time not worked by employees including paid holidays, paid vacations, group life insurance, health insurance and long-term income protection insurance, promotions, demotions, transfers, lay-offs or reappointments of employees, the procedures applicable to the processing of grievances, the classification and job evaluation system, and the conditions applicable to leaves of absence for other than any elective public office or political activities or training and development.

...

18. (1) Every collective agreement shall be deemed to provide that it is the exclusive function of the employer to manage, which function, without limiting the generality of the foregoing, includes the right to determine,

(a) employment, appointment, complement, organization, assignment, discipline, dismissal, suspension, work methods and procedures, kinds and locations of equipment and classification of positions; and

> (b) merit system, training and development, appraisal and superannuation, the governing principles of which are subject to review by the employer with the bargaining agent,
>
> and such matters will not be the subject of collective bargaining nor come within the jurisdiction of a board.

In its decision in **Ontario Public Service Employees Union and Crown in Right of Ontario**, File No. T/32/81, decision dated May 17, 1982 (hereinafter referred to as "**T/32/81**"), the Tribunal articulated its basic approach to determining whether a proposal is bargainable under section 7 or excluded from the scope of collective bargaining by section 18(1). At pp.2-3 of its decision, the Tribunal stated the following:

> **While there are issues that fall clearly within either Section 7 or 18 it is readily apparent from the proceedings in this matter that many issues are capable of being interpreted as falling under both sections. The dilemma facing the Tribunal is to determine under which heading a particular proposal falls.** That dilemma may be illustrated by one of the proposals put forth by the Union which it alleges is a safety matter. There is nothing in The Act which prohibits bargaining about safety. However, the safety proposal provides that no employee will be required to work alone in a mental retardation, psychiatric or correctional facility. The employer resists the proposal on the basis that the union has infringed the employer's exclusive right to determine complement. Since the proposal clearly involves numbers of employees it is obviously capable of being interpreted in the manner suggested by the union and in the manner suggested by the employer. How then is this Tribunal to resolve the issue?
>
> There is no reason why the two sections of The Act cannot stand together. There are many instances where the law has resolved what appears to be conflicting statutory provisions. See e.g. **Re Metropolitan Toronto Board of Commissioners of Police and Metropolitan Toronto Police Association** (1975) 8 O.R. (2d) 65. **In order to determine under what section of The Act a particular proposal falls one must examine the proposal**

> **objectively in order to determine the basic nature and effect of the proposal. If after examination the proposal may reasonably be considered to fall under Section 7 it is permissible subject for bargaining notwithstanding that it may touch on matters that fall within Section 18. The converse is also true;** thus if after examination, the nature and effect of the proposal are such that it may reasonably be considered to fall within Section 18 it is a prohibited subject for bargaining notwithstanding that it may touch on matters that fall under Section 7. **The difficult situation, of course, is in those cases where a proposal may appear to fall equally within both Sections.**
>
> [emphasis added]

When a proposal, objectively examined, is capable of falling within both sections 7 and 18(1), the Tribunal seeks to determine the main thrust of the proposal, i.e. its basic nature and effect. If the dominant quality and substance of the proposal falls within section 7 it will be found to come within the scope of collective bargaining, even if it also relates to matters covered by section 18(1). The reverse will also be the case if upon examination the Tribunal finds that the dominant quality and substance of the proposal comes within subject areas reserved exclusively for management under section 18(1) of **C.E.C.B.A.** Such a proposal will be excluded from bargaining even if it touches areas covered by section 7.

In **Ontario Public Service Employees Union and Crown in the Right of Ontario,** File No. T/19/84, decision dated October 4, 1984 (hereinafter referred to as "T/19/84"), the Tribunal addressed the problem of uncertainty and ambiguity in proposals which may hamper the determination of their basic nature and effect. At pp. 3-4, the Tribunal stated the following:

> That is not to say that there are not situations where the language of the proposal is uncertain or where a concept is placed before the Tribunal where there is a clear possibility of

two or more interpretations. Where the language is patently ambiguous, the method of resolving the matter must be against those drafting the proposal and the proposal or concept will be disallowed and remitted. This, hopefully, will ensure that imprecise language is not presented to the arbitration board and will avoid further disputes and unnecessary procedures.

We are also of the view that there are different levels of ambiguity. Where the proposal is clearly ambiguous it is in order to remit the matter. However, there are lesser levels of ambiguity or differences between the parties because of a particular gloss that one of them has put on the matter that may be better clarified by discussion between the parties which enables them to reach an understanding as to the purpose and intent of the proposal. A mere difference in interpretation does not mean the proposal is ambiguous. In some of these situations, the concerns may be resolved by a specific undertaking or by the Tribunal noting and recording the proper intent of the proposal. That process would clarify any misunderstanding and save further applications arising from remitting the matter.

And finally, the Tribunal has no desire to become involved in the drafting process. However, where some proposals are improper in part, or there is a word or phrase which causes us some concern, rather than remit we may allow the proposal to proceed if the offending word or phrase is deleted.

The Union proposals contested by the Employer as falling outside the scope of collective bargaining permitted under **C.E.C.B.A.** involve the following areas:

A. Privatization/Contracting Out
B. Technological Change
C. Overtime
D. Second Language Compensation
E. Insured Benefit Plans
F. Posting and Filling Vacancies
G. Pensions
H. Unclassified Staff
I. Casual Employees

A. PRIVATIZATION AND CONTRACTING OUT:

The union proposal is as follows:

2. **Privatization/Contracting Out**
The Union proposes that Article 24 be amended to include a new section concerning Privatization and Contracting Out as follows:

[A] "It is agreed that any privatization, diversification, divestment or similar action in existence on the effective date of this agreement shall be examined by a union/management Privatization Review Committee with a view to establishing the means by which such a privatized, diversified, divested or similar undertaking can be returned to the Ontario Public Service."

[B] "Effective January 1, 1989, the Employer undertakes not to contract out, diversify, divest or otherwise remove from the bargaining unit work now performed by the bargaining unit."

Through Paragraph A, the Union seeks the establishment of a union/management Privatization Review Committee to consider means by which privatized undertakings can be returned to the Ontario Public Service. The Employer maintains that this proposal is inconsistent with the exclusive function of management to determine complement, organization, and work methods and procedures as established through section 18(1). Counsel for the Employer argues that it constitutes a prohibition against privatization and contracting out and is thus improper. Counsel for the Union disputes that the proposal creates a total ban on contracting out and privatization. He submits that the clause concerns job security and seeks to deal with the effects of privatization decisions that have already been implemented, and thus falls within the scope of collective bargaining detailed in section 7.

In **T/19/84** (decision dated October 4, 1984 and decision dated January 28, 1985), the Tribunal determined that a proposal which seeks to place a total prohibition on lay-offs or contracting out is inappropriate because the employer has the right to determine complement. At the same time, the Tribunal noted that section 7 expressly brings the subject of lay-offs within the scope of collective bargaining. The Tribunal then found that the Union was entitled to seek to "blunt the harsh edge of unemployment through lay-off" (October 4, 1984, p.8) and present a proposal where the basic nature and thrust of it was to enhance job security. In a similar vein, the Tribunal determined that while the Union could not seek a total ban on contracting out, it could bargain means of mitigating the effects of contracting out.

In **City of Welland and Welland Fire Fighters Association, Local 481** (1982), 141 D.L.R. (3d) 425, the Ontario Divisional Court was required to determine whether an arbitration board constituted under the **Fire Departments Act**, R.S.O., 1980 c.164 was entitled to limit the employer's power to contract out. Section 5(1) of the **Act** permitted the fire fighters to bargain "working conditions". In upholding the jurisdiction of the board of arbitration to limit the Employer's power to contract out, the Court unanimously found that "contracting out" as it affects job security of members of the bargaining unit is properly a subject of collective bargaining under [The **Fire Departments**] **Act.** Of importance to the matters at hand, it concluded that the term "working conditions" in s.5(1) included matters relating to job security. In the course of his judgement, Hollingworth J. stated at p.434:

> We are all agreed that the working conditions include matters of job security ...".

The Tribunal is satisfied that the main thrust of clause A of the Union's proposal to establish a union/management Privatization Review Committee is to enhance job security for members of the bargaining unit and that this falls under "terms and conditions of employment" in section 7 of **C.E.C.B.A.** Moreover, section 7 expressly covers the areas of lay-offs and re-appointments. The Union's proposal does not seek to ban privatization because it is directed to privatization that has already occurred. It seeks to mitigate its effect by examining means that might be available for returning affected work to the public service. Although the result of the discussions could impact on complement, organization, work methods and procedures, areas covered by section 18(1), it does not do so in a conclusive way. The Union is not permitted to demand a total reversal of privatization decisions already made. That would be tantamount to the flip side of a non-contracting out clause. The proposal at hand, though, goes beyond that. It sets up a joint committee to look at means that might be available for returning privatized areas to the public service. Because "means", "with a view to" and "can", i.e. "could", not "shall", are very broad terms, we are not prepared to conclude that the proposal is restricted to a total reversal of the privatization decisions already made. This is a proposal which falls under both sections 7 and s.18(1). On balance, however, we conclude that its dominant thrust falls within areas delineated by section 7 notwithstanding that it touches upon subjects covered under by section 18(1). Accordingly, the proposal is allowed.

In Paragraph B the Union proposes a complete ban on contracting out, diversifying, divesting or otherwise removing work from the bargaining unit. We find, consistent with the Tribunal's decisions in **T/19/84,** decisions dated (October 4, 1984 and January 28, 1985) and **Crown in Right of Ontario (Workers' Compensation Board)**

and Canadian Union of Public Employees, Local 1750, File No. T/1/85 (decision dated November 26, 1985, hereinafter referred to as "**T/1/85**", that the main thrust of this proposal infringes areas reserved exclusive for the Employer under section 18(1) of **C.E.C.B.A.** A proposal which seeks to mitigate the effects of contracting out or bargain about resulting lay-offs, as opposed to banning contracting out, would come within the scope of collective bargaining. In its current form, however, Paragraph B does not come with the scope of bargaining and is not allowed.

B. TECHNOLOGICAL CHANGE:

The Union proposal is as follows:

> **5. Technological Change**
> Add new section in Article 18 as follows:
>
> [A] "The employer agrees that before any machine equipped with a VDT or equivalent screen is introduced into the workplace such equipment shall be shielded in such a way as to eliminate low level radiation or reduce it to a level acceptable to the Union.
>
> [B] The employer agrees that supervision of people by people is the most appropriate in a free and democratic society and accordingly agrees to eliminate monitoring of employees' work by electronic or similar means where it now exists and undertakes to disconnect features from its equipment which would permit electronic monitoring.
>
> [C] Where it is necessary to introduce a major change to equipment whose technology has or is projected to have an adverse impact on the bargaining unit, the employer agrees to give the union one (1) year's notice and the impact of the proposed equipment will be an item on the agenda of a meeting of the committee referred to in Article 24.16.2."

The Employer does not contest **Paragraph A.**

Through **Paragraph B,** the Union proposes that the Employer eliminate electronic monitoring of employees' work and disconnect features from its equipment which would permit electronic monitoring. The Employer contends that this proposal infringes the Employers' exclusive jurisdiction to determine work methods and procedures and appraisals. The Union, on the other hand, argues that the main purpose of the proposal is to protect the health and safety of employees and thus falls within the scope of bargaining under s.7 of **C.E.C.B.A.**.

In **T/32/81,** decision dated May 17, 1982, the Union proposed an article which stipulated the following:

> (d) The parties agree that
> (iii) employees' work performance on such equipment will not be monitored by the equipment itself.

Just as in the instant situation, the employer objected to the proposal on the ground that it infringed the employer's exclusive function over appraisals and determining work methods and procedures. The union asserted that the proposal was not directed to those areas but did not detail what its purpose was. The Tribunal disallowed the proposal for the following reason, at p.9: "Absent any specific indication from the union, it appears that the section can only be directed towards evaluation or appraisal and accordingly is prohibited".

Subsequently, in **T/19/84,** decision dated January 28, 1985, the Tribunal considered a similar proposal. This time in its submissions the Union described the purpose of the proposal as the protection of the health and safety of employees: At p.6, the Tribunal quoted from the Union' submissions:

5. **This proposal has as its purpose the health and safety of the employees. The Union is concerned about the potential psychological and physiological harm that may be imposed upon employees where they are to be monitored by mechanical, electronic or other non-human monitoring devices. The Union clearly has the right to bargain about health and safety matters and has a legitimate concern that employees not suffer from the potentially harmful effects of electronic monitoring.** The proposal in no way takes away from the employer's right to appraise employees.

The work (sic) "appraisal" has a subjective connotation and is defined by Webster's dictionary as "an act or instance of appraising". "Appraise" is defined as meaning "to evaluate the worth, significance or status of ...". Thus, the appraising of an employee is a subjective, evaluating function.

On the other hand, electronic monitoring deals with a separate and totally distinct notion from appraisals, having nothing to do with subjective evaluations. Accordingly, this is a matter which is not prohibited under the legislation and should be decided by the Swan Board."

[emphasis added]

Notwithstanding the Union's assertion that the purpose of the proposal was health and safety, the Tribunal concluded that the proposal was directed toward evaluation or appraisal and thus was not allowed. At p.10 the Tribunal stated:

In an earlier decision on May 17, 1982, this Tribunal was called upon to deal with a union proposal concerning the monitoring of an employee's work performance by equipment (proposal 24(d)(iii)) and found that the proposal was directed towards evaluation or appraisal and accordingly the proposal was disallowed. [In that case, the union set out no purpose behind its proposal[. The proposal now put forth by the union concerns the monitoring of employees by equipment or "non-human monitoring capability". **We are not convinced by the proposal or by the argument submitted** [as quoted above] **that this is a health and safety matter and that we should depart from our earlier determination. The proposal is disallowed.**

[emphasis added]

In **T/1/85,** (decision dated November 26, 1985), the Union's proposal prevented individual work measurement. The Union argued that it was a health and safety proposal and the Employer asserted that it infringed its exclusive function to appraise employees. At p.7, the Tribunal disallowed the proposal because it was not persuaded by the "union's mere statements that appraisal would impair an employee's health and safety ...":

> Proposal 6.05 14 prevents individual work measurement and the employer submits that this proposal encroaches on its exclusive function to appraise employees under Section 18 of the Act. The Union suggests that the proposal is a health and safety proposal which minimizes the adverse effects or stress and that particular appraisal methods may "have adverse effects on individual employees' human dignity, and health and safety".
>
> On balance **we are not persuaded by the union's mere statements that appraisal would impair an employee's health and safety and thus we find the proposal is contrary to the employer's right to appraise** employees under Section 18 of the Act and is disallowed.
>
> [emphasis added]

In the instant hearing, the Union submitted exhibits in support of its assertion that the primary focus of its proposal to eliminate electronic monitoring was health and safety. In October of 1987, the Union made a written submission to the Ombudsman of Ontario: **Submission by the Ontario Public Service Employees Union on Electronic Monitoring to the Ombudsman of Ontario** dated October 30, 1987. The Report covered electronic monitoring systems that are in place, their impact on human rights and

alternatives for a new system. One of the exhibits attached to that Report was an article by Mr. Andrew Clement in May of 1984 from the Department of Computer Science at the University of Toronto: **Electronic Management: The New Technology of Workplace Surveillance.** At p.8 of the article, Mr. Clement described health and safety and stress-related implications of electronic monitoring as follows:

> **4.2 Health and Safety/Stress**
>
> **It is clear that automated surveillance does not pose a direct threat to employee health or safety in the same way that working with toxic chemicals or heavy objects obviously does. However, the indirect effects may nevertheless by quite significant.** Particularly in the case of routine work, close monitoring of employee performance is used to maintain high uniform rates of production. **When the work involves the repetition of a relatively fixed pattern of physical motion (such as keying), prolonged work at a rapid pace can lead to repetitive strain injuries such as Carpal Tunnel Syndrome and tendonitis.** Studies of postal coders in the U.S. [9] and checkout personnel in Ontario [2] have shown an increased incidence of disorders of this kind.
>
> **A more general health problem that can be linked with automated surveillance is stress.** Stress is a normal physiological response but when it becomes chronic it can lead to mental and physical exhaustion, anxiety, and depression. In extreme cases it leads to serious illnesses such as coronary heart disease, high blood pressure, and ulcers. Stress is considered by some a major factor in telephone operators consuming abnormal quantities of tranquilizers on the job [5] and taking unpaid leaves.[2]
>
> Stress is related not only to performing work under pressure, but is also linked to the amount of discretion a person can exercise in their activities. A 1979-80 study by the National Institute of Occupational Safety and Health (NIOSH) found that clerical VDT operators showed higher stress levels than any other group of workers NIOSH had ever measured, including occupations popularly regarded as high-stress, such as air traffic controllers [34]. Part of the explanation for this finding is that while other occupations may be under more pressure given the serious consequences of mistakes, clerical workers are under more stress since they have very little autonomy or control over their work. **Automated surveillance systems,**

regardless of the routineness of the work, are used by management to remove effective control from employees and in this way contribute to the stress of the job.

The Union further submitted in evidence the following report: **Report on the 1987 Office Worker Health and Well-Being Survey.** This was prepared for the Union by Margaret Denton and Lynda Hayward Social Data Research Limited. At p.13, the Report addresses "Computer Monitored Quotas and Ill Health":

> A large proportion of the office workers who participated in the survey, over 73 per cent, worked under productivity quotas which were computer monitored. These people were figuratively "working with someone looking constantly over their shoulder". How does this affect their state of well-being?
>
> To examine the relationship between work with a computer monitored quota system and the prevalence of musculo-skeletal symptoms, a summary measure of musculo-skeletal symptoms was created by counting the number of times respondents reported musculo-skeletal symptoms. ...
>
> The data in Table 3.1.1 indicate that office workers who worked with computer monitored quotas were significantly more likely to have self-reported musculo-skeletal symptoms than those without (p.0001). Whereas 64 per cent of those who worked without computer monitored quotas had no symptoms, only 22 per cent of those with such quotas had no symptoms. Conversely, 28 per cent of those with computer monitored quotas reported experiencing six or more symptoms at least once a week over the last six months, as compared with 5 per cent of those without computer monitored quotas.
>
> ...
>
> The relationship between work with computer monitored quotas and a scale indicating the number of self-reported musculo-skeletal conditions, as shown in Table 3.1.2, was found to be similar to that for musculo-skeletal symptoms. Approximately 82 per cent of those without computer monitored quotas reported that they had not developed any musculo-skeletal conditions in the past six months, as compared with 63 per cent of those with such quotas. As the R indicates, about 14 per cent of the variance in the number of self-reported

> musculo-skeletal conditions developed can be explained by work with a computer monitored quota.
>
> ...
>
> One would expect that work with constant monitoring could also affect the job-related stress experienced by the office worker, and that if this were the case, the incidence of stress-related symptoms and conditions. ... Approximately 46 per cent of those with quotas reported stress-related symptoms as compared with 20 per cent of those without. Moreover, 46 per cent of those with quotas reported experiencing six or more symptoms at least once a week during the six month period, while only 20 per cent of those without computer monitored quotas had six or more stress-related symptoms. ...
>
> ...
>
> In sum, work under the conditions of a computer monitored quota system has been found to be associated with several of the indicators of self-reported ill health developed for this analysis. Moreover, this association cannot be explained simply by the pace of the work exerted to meet the quota.

The Tribunal has repeatedly endorsed the Union's entitlement under section 7 of **C.E.C.B.A.** to bargain health and safety. In its previous decisions respecting electronic monitoring, however, the Tribunal has concluded that the primary thrust of the proposal infringed exclusive management functions over appraisals and work methods and procedures. In **T/32/81**, the Union did not specify any purpose behind its proposal. In **T/19/84**, the Union expressed the health and safety purpose behind its proposal but the Tribunal stated that it was not convinced by the proposal, standing on its own, or the argument that it was a health and safety matter. It would appear that no data was submitted by the union to support its assertion that the proposal was directed to health and safety. Similarly, in **T/1/85**, the Tribunal disallowed the proposal stating that it was not persuaded by the Union's "mere statements" that the form of appraisal would impair health and safety.

The instant proposal respecting electronic monitoring clearly covers subjects which fall into both s.7 and s.18. In this proceeding, however, and unlike the circumstances in the previous cases, the Union presented in evidence articles, reports and other documents substantiating its health and safety concerns with electronic monitoring. Having reviewed these submissions, the Tribunal is satisfied that the primary purpose of the proposal is to protect the health of employees, notwithstanding that it touches the area of appraisal under section 18. The proposal does not seek to establish the method of appraisal; rather, it seeks to circumscribe one method which in its view jeopardizes the health of the employees. On balance, we conclude that the proposal contained in **Paragraph B** is within the scope of collective bargaining because, and so long as, the primary focus and objective of the proposal is the health and safety of employees.

Turning to **Paragraph C,** the Union proposes that the Employer agree to give the Union **1 year's notice** where it is necessary to introduce a major change to equipment whose technology has or is projected to have an adverse impact on the bargaining unit. In addition, the proposal includes an understanding that the impact of the proposed equipment will be discussed by the Committee referred to in Article 24.16.2.

Mr. Todd, the chief spokesperson for the Union in the negotiations, stated that the motivating force behind this proposal is the recognition that the sooner the introduction of such equipment is known the sooner the potential adverse effects may be determined and the sooner the Union can seek to implement preventative action to modify or deflect the adverse effects.

The Employer maintains that the proposal places a complete ban on the introduction of new technology and offends the Employer's exclusive authority over work methods and procedures and kinds and locations of equipment.

The Tribunal cannot accept the Employer's characterization of this proposal as an effective ban on the introduction of new equipment. The main thrust of the proposal is to protect job security by minimizing adverse effects of new technology. Accordingly, the proposal in **Paragraph C** falls within the scope of collective bargaining under section 7 of **C.E.C.B.A.** We note that a similar proposal was found to be appropriate in **T/19/84**, decision dated January 28, 1985 (see also **T/1/85**).

C. OVERTIME:

The Union proposal is as follows:

27. Article 13 - Overtime

Add new paragraph as follow:

"The employer agrees to distribute overtime as fairly as possible and to that end the employer agrees to keep a roster of overtime availability and offer it to employees on the basis of seniority with the most senior employee having the right of first refusal."

The Union proposal seeks the establishment of a fair system for the distribution of overtime. Under section 7, the Union is expressly entitled to bargain about hours of work and overtime. The distribution of overtime directly involves the employee's hours of work. The proposal, however, may also be characterized as dealing with "assignment" under section 18(1). On balance, the Tribunal concludes that the main thrust of the proposal falls into permissible areas of collective bargaining under section 7, specifically overtime and hours of work, although it touches assignment. The proposal does not

negate the assignment of the work. Instead it speaks to the method of determining which employees will work the hours involved in the assigned overtime work. Accordingly, the proposal is allowed.

D. SECOND LANGUAGE COMPENSATION:

The Union proposal is as follows:

24. Second Language Compensation (New)

[A] An employee who uses any second language on the job, including such languages as sign language, blissymbolics and braille, shall be paid a second language premium of ten per cent (10%) salary.

[B] An employee who wishes to pursue language training for the purpose of career advancement shall be give (sic) such training by the employer during working hours and with the employer paying for all related expenses such as tuition, books, course material, etc."

The Employer does not object to **Paragraph A.**

In **Paragraph B,** the Union proposal stipulates that the Employer shall provide employees with second language training. Although the proposal may impact on job security and the prevention of lay-off by upgrading skills and may thereby also affect promotions, and transfers (areas permitted under section 7), the main thrust of the proposal is training which is an area reserved exclusively to the Employer under section 18(1). Accordingly, the proposal is not allowed.

E. INSURED BENEFIT PLANS:

The union proposal is as follows:

13. Article 45 - Insured Benefits Plans-General

Add New Article 45.4 as follows:

> "The parties agree that current retirees and present members of the bargaining unit when they retire will continue to receive benefits of Articles 39, 40, 41, 43, 44, 45, 46 and 57."

The Employer does not object to this proposal as it relates to present members of the bargaining unit and benefits they will receive when they retire.

The Union's proposal also speaks to benefits for current retirees. The Employer objects to this aspect of the proposal on the ground that under section 7 the Union's entitlement to negotiate extends only to employees and not to non-employees, such as current retirees.

The subject of bargaining for current retirees has been addressed on numerous occasions. In **Re Liquor Control Board of Ontario and Ontario Liquor Board Employees' Union,** an interest arbitration Award of a board chaired by M. Teplitsky, October 1979, the board concluded that the union was entitled, on behalf of the current bargaining unit, to negotiate improved life insurance benefits for retirees notwithstanding that they were neither members of the bargaining unit nor employees. On review by the Ontario Divisional Court ((1980) 29 O.R. (2d) 705), the Court upheld the decision of the board of arbitration as being correct. At pp. 709-710, the Court stated the following:

> The question then is whether or not the insurance benefits for retirees are terms and conditions of employment for those who are currently employed and for which the union may negotiate. The union submitted that there were two grounds upon which the current employees could bargain for retiree benefits, whether or not the retirees had been or were members of the union. First, on the altruistic ground that many employees have worked with the retirees and are interested in their

welfare. Secondly, on the ground of self-interest; in other words, they wish to bargain to improve the retiree benefits from time to time because they themselves will be retired in the future and it would protect their own future interest. They state that the employees, as part of the total compensation package for which they were bargaining, included this as one item of importance and therefore were willing to weigh it with the other monetary benefits that may have been of more immediate benefit to them. Collective bargaining must cover items that come within the scope of the Act. There is no legal authority for a bargaining agent to bargain solely on altruistic grounds because there would be no limit to the issues. There must be some nexus between the issue that is being bargained for and the employment. While the retirees in the present case are not currently employees, they are former employees and are not strangers to the employer. It has been recognized that a collective bargaining agreement may include provisions for non-employees. In **Re Metropolitan Toronto Police Ass'n and Board of Com'rs of Police for Metropolitan Toronto** (unreported Divisional Court, released April 28, 1980 [since reported 28 O.R. (2d) 624, 111 D.L.R (3d) 658] the Court found that it was a benefit to the employees to provide for the discharge of their obligations to their dependants in certain contingencies and therefore a proper matter for collective bargaining. It was acknowledged in **Re Blouin Drywall Contractors Ltd. and United Brotherhood of Carpenters and Joiners of America, Local 2486** (1975), 8 O.R. (2d) 103, 57 D.L.R. (3d) 199, that a collective agreement may include benefits for non-employee members of the union. The principle in **Re Blouin Drywall** was approved in **Local 273, Int'l Longshoremen's Ass'n et al. v Maritime Employers' Ass'n et al.**, [1979] 1 S.C.R. 120, 89 D.L.R. (3d) 289, 23 N.B.R. (2d) 458. In the present case, some retirees are not and never have been members of the union. We were not referred to any Canadian decisions directly on point but were referred to **Allied Chemical & Alkali Workers of America Local Union No. 1 v Pittsburgh Plate Glass Co., Chemical Division et al.** (1971), 404 U.S. 157. In that case the Supreme Court of the United States expressly held that bargaining for retirees pension benefits was not a mandatory obligation and therefore could not be required under the **National Labour Relations Act.** It must be remembered that the legislation in the United States differs from that in Ontario and British Columbia. In British Columbia, the Labour Relations Board has held that insurance or pension benefits for retirees is a matter that is within the purview of the British Columbia legislation which requires persons to bargain in good faith with respect to the terms and conditions of work. It has decided that a union can strike if such terms are not agreed upon. In **Pulp & Paper Industrial Relations Bureau v Canadian Paperworkers Union** [1978] 1 Canadian L.R.B.R. 60, the difference between the American and Canadian approach was specifically considered by the B.C.

> Labour Relations Board and it concluded that retirees' benefits were proper terms and conditions of employment to be considered in a collective agreement. I am of the opinion that the same applies in Ontario as in British Columbia.
>
> While the Court decisions in Canada and the above-referred-to British Columbia Labour Relations Board decision are not directly on point, I am of the opinion that the principles enunciated therein are clearly applicable to the present case and that the board was correct in its interpretation of s.6 of the Act. It is to be noted that the old collective agreement signed by the applicants contained provisions for life insurance benefits for retirees (although not stated to be retroactive) as well as death benefits for widows and dependants of employees and benefits for part-time cashiers who are not members of the bargaining unit. No objection to these points has been raised by the applicants and it would appear that they are inconsistent in their argument. For the above reasons, the application should be dismissed with costs.

An appeal of the above decision to the Ontario Court of Appeal was dismissed ((1981) 33 O.R. (2d) 592). The Court of Appeal, though, did not endorse the decision of the Divisional Court. Instead, it stated at p.592 that, "[t]he question could have been and should have been taken to the tribunal qualified to deal with these questions - the Ontario Public Service Labour Relations Tribunal".

Subsequently, the Tribunal did consider the issue in **Ontario Public Service Employees Union The Crown in Right of Ontario,** File No. T/32/81, decision dated May 17, 1982. The Tribunal declined to follow the reasoning of either the Teplitsky Board of Arbitration or the Ontario Divisional Court. The Tribunal emphasized the distinctions between non-restricted, private sector bargaining and the narrower public sector bargaining. The Tribunal adverted to the statutory provisions for pension benefits for retirees in the **Public Service Superannuation Act and the Superannuation Adjustment Benefits Act** which are not provided for private sector employees. The Tribunal commented that the Union's representation rights did not extend to persons other than

employees and thus could not encompass retirees. At pp.31-33, the Tribunal summarized its conclusions as follows:

> The issue cannot be resolved by asking simply whether benefits for retirees are capable of being terms or conditions of employment. One must go further and determine whether they are terms and conditions of employment contemplated by The Act and for which the union has the right to bargain. The union has the right to bargain for employees who under The Act are Crown Employees as defined in **The Public Service Act** and that Act defines a Crown employee as "a person **employed in the service** of The Crown or an agency of The Crown..." **The Public Service Superannuation Act,** as well as the concept of a retiree, indicates that a retiree is not "employed in the service" and cannot be represented by the union. The definition of employee in this regard is very different from the definition of employee in the **Labour Relations Act.** Therefore the differences in the legislation must be taken into account particularly in determining what is a term of employment and whether the union has the right to represent retirees.
>
> ...
>
> In summary, the cases referred to by the Divisional Court must be considered in the light of the particular statutes and statutory policies and in the light of the particular facts and issues decided and do not in our view compel a conclusion that retirees' benefits are terms and conditions of employment for which the union may bargain under The Act. Therefore the proposals affecting retirees are prohibited only insofar as they attempt to deal with persons who are not currently employed. Bargaining for retirement benefits for current employees is however permissible.

No legislative changes or subsequent decisions of the Courts having a bearing on the issue were brought to the attention of the Tribunal. Accordingly, the Tribunal, through the application of its earlier decision in **T/32/81,** concludes that the Union's proposal which seeks to extend benefits to current retirees does not come within the scope of collective bargaining under section 7 of **C.E.C.B.A.** As noted, it is

uncontested that the proposal, as it relates to retirement benefits for current employees, does come within the scope of collective bargaining.

F. POSTING AND FILLING OF VACANCIES:

The Union proposal is as follows:

10. Article 4 - Posting and Filling of Vacancies

The Union proposes that this article be changed to provide as follows:

"All vacancies to be filled in Northern Ontario shall have an area of search of not less than five hundred (500) kilometres while all vacancies to be filled in Southern Ontario shall have an area of search of not less than one hundred (100) kilometres. Notwithstanding the area of search, any employee who becomes aware of a vacancy is entitled to apply for such a position and such application will be dealt with in accordance with the provisions of Article 4."

The Union proposal seeks to increase the size of the area of search for vacancies. The Union submits that the proposal falls under areas of bargaining permitted by section 7, specifically transfers and promotions. The Employer, on the other hand, maintains that the employer has an exclusive right to limit the area of search under section 18(1) but did not point to the express portion of article 18(1) that would be allegedly infringed by the proposal. The brief and undetailed references to Divisional Court decisions in the Employer's submission indicate, at most, that the Employer's right to limit the area of search would derive from section 18. The short reference does not suggest that the Court considered whether the subject would also fall within the scope of bargaining under s.7 of **C.E.C.B.A.** or which area would be considered dominant in any particular proposal.

In **T/71/84, Ontario Labour Board Employees Union and Crown in Right of Ontario (Liquor Control Board of Ontario),** File No. T/71/84, decision dated May 14, 1985, the Tribunal allowed a proposal which restricted time periods between transfers. The Tribunal noted that under section 7 the Union was expressly entitled to bargain about transfers while the Employer has the right to determine appointment, complement and assignment. The Tribunal then determined that the proposal was permissible since it was directed to transfers, even though its effect could touch on areas reserved to the employer.

The Tribunal is satisfied that the instant proposal falls within the scope of collective bargaining to the extent that it is directed to "promotions, demotions, transfers, lay-offs or re-appointments of employees" as set out in article 7 of **C.E.C.B.A.**, notwithstanding that it may touch on areas reserved to the Employer under section 18(1).

G. PENSIONS:

The union proposal is as follows:

11. Pensions

The Union proposes a new article to provide for the following principles regarding the pension plan:

(a) That the pension plan be made negotiable between the union and the government.

(b) That the plan be reorganized in such a way that the unions have a plan separate from any other current members.

(c) That the fund be invested in the market and that such investment be used only for maintenance or improvements of the pension plan for the benefit of plan participants.

(d) That such negotiations include dealing with the question of governance of the plan, including the idea of joint trusteeship.

(e) That such negotiations deals with improvements to survivor benefits and early retirement without any increase in employee contributions.

Two areas of concern are raised by this proposal. First, whether the Employer is estopped by its conduct from raising its objection and, second, if not, whether the proposal falls within the scope of bargaining under section 7 of **C.E.C.B.A.**

1. ESTOPPEL:

The evidence establishes that commencing September 22, 1988 the Employer and the Union, (on behalf of itself and other unions under **C.E.C.B.A.**), met with a view to negotiating an agreement on pensions. These negotiations preceded by a couple of months the negotiations for the amendments to the Working Conditions and Employee Benefits Agreement under review in the instant application. According to the Employer, the pension negotiations were unilaterally initiated by the Employer, were fully outside the scope of **C.E.C.B.A.** and were understood as such by the Union. The group involved in this negotiation was described by the Employer as the Public Service Pension Working Group. Mr. Todd was the spokesperson for the Union and Mr. James Thomas, the Assistant Deputy Minister, was the spokesperson for the Human Resources Secretariat. The Union asserts that the Employer's conduct in these negotiations constitutes an estoppel with respect to the status of pensions as a bargainable issue under **C.E.C.B.A.**, i.e. in the negotiations for amendments to the Working Conditions and Employee Benefits Agreement.

Management tabled its first proposal in the pension negotiations on October 27th and a further working paper on November 8, 1988. The Union put its proposal on the table on November 10, 1988. Further proposals were exchanged in early December of 1988 but the Union broke off negotiations after receiving the Employer's third proposal on December 12, 1988.

On October 27, 1988, before the pension negotiations got underway, Mr. Todd advised Mr. Thomas that as a pre-condition to entering talks he wanted a written commitment from the Employer that the Employer would treat the negotiations seriously. Mr. Thomas provided Mr. Todd with the following letter:

> November 4, 1988
>
> Mr. Andy Todd
> ...
> Dear Andy:
>
> I want to confirm to you our view of the nature of the negotiations in the pension working group chaired by Terry Stephen and initiated by the Treasurer at the meeting with the unions on September 22nd.
>
> As set out in Mr. Nixon's letter of September 27, 1988, while addressing the major financial issues relating to pensions for members of the pension plan, the working group is also prepared to look at the concept of splitting the public service pension plans, and at concepts for joint decision-making, including negotiability.
>
> The "Summary of Partnership Package" which was tabled at the initial working group meeting on October 27th, demonstrates the seriousness of the government's interest in moving to a partnership arrangement with representatives of plan members.
>
> **With this in mind, I want to assure you that we will be negotiating in good faith with you to endeavour to reach agreement on the issues on the agenda. We will give our best efforts in these negotiations to resolve all issues.**
>
> **Although we are both committed to reaching an agreement, we also acknowledge that in the event of an impasse, the**

negotiations will break off and each party will be free to take such actions as it considers appropriate at that time.

In order to provide the best opportunity for effective negotiations on November 8, 9 and 10, we have arranged to meet at the Brownstone Hotel, 15 Charles Street East. Separate caucus rooms have also been booked for your use and for ours.

Terry Stephen will be proposing on Tuesday that the first item of business be the setting of an agenda for these three days of meetings. By the end of these three days, we should be in a position to determine whether a meeting of the full working group - including representatives of the OPPA and non-bargaining unit employees - would be desirable.

If you have difficulty with any of the above comments, please contact me immediately.

Yours sincerely,

"James R. Thomas"
Assistant Deputy Minister

cc: Terry Stephen

[emphasis added]

It is clear from the evidence that Mr. Todd, on behalf of the Union, wanted these pension negotiations effectively brought under **C.E.C.B.A.** He acknowledged in his evidence that the commitment he obtained from Mr. Thomas in his November 4, 1988 letter, set out above, fell short of what he had wanted. The Union, though, relies on this letter as establishing an undertaking by the Employer that the negotiations would be recognized as falling within the framework of **C.E.C.B.A.** On this basis, the Union argues that the Employer is now estopped from asserting that pensions are excluded from the scope of collective bargaining under s.7 of the **C.E.C.B.A.**

The Tribunal has fully reviewed the submissions and evidence and readily concludes that the Employer did not represent to the Union, either through Mr.

Thomas's November 4th letter or in any other way, that by negotiating pensions under the framework of the Public Service Pensions Working Group it was agreeing to do so under the provisions of **C.E.C.B.A.** Paragraph 5 of the November 4th letter confirms the Employer's intention to the contrary. It states, "... in the event of an impasse, the negotiations will break off and each party will be free to take such actions as it considers appropriate at that time". Accordingly, the Union has failed to establish an essential pre-condition of estoppel: a representation intended to affect the legal relations between the parties and to be acted on accordingly wherein the Union was led to believe that the Employer would not enforce its strict rights.

Moreover, the Tribunal has repeatedly stated that the act of the Employer negotiating with the Union in an area considered to fall outside the scope of bargaining does not itself establish the necessary ingredients for estoppel. At pp. 7-8 of **T/32/81**, decision dated May 17, 1982, the Tribunal stated the following:

> **Also it is our view that consensual provisions or agreements made concerning matters that fall within the prohibited area of bargaining cannot estop the employer from invoking the statutory prohibitions.** It is our view that in the give and take of negotiations the employer may agree to matters which fall within the statutory prohibitive areas; it may do so in response to the union's agreeing to drop other matters. Also the employer may agree to matters that ostensibly touch or encroach upon its exclusive functions on the basis that the substance of the agreement is permissible. **This Tribunal does not wish to discourage bargaining or voluntary agreements which include prohibitive matters,** not only because we deem it advisable to encourage voluntary agreements but also because we recognize the difficulty in characterizing issues or proposals as properly or strictly falling within either Section 7 or 18 of The Act. It is for those policy reasons, which serve to effectuate the scheme of The Act, that we are not prepared to hoist the employer on its own petard, i.e. by barring the employer from raising the argument that it now raises.
>
> [emphasis added]

For the reasons set out above, the Tribunal concludes that the Union has failed to establish that the Employer is estopped from relying on its strict legal rights under **C.E.C.B.A.** respecting the bargainability of pensions.

2. WHETHER PENSIONS FALL WITHIN THE SCOPE OF COLLECTIVE BARGAINING:

The Tribunal has addressed the status of proposals relating to pensions on numerous occasions. Section 18(1) stipulates that the exclusive function of the Employer includes the right to determine **superannuation.**

In **T/32/81,** decision dated May 17, 1982, the Tribunal considered the status of a series of pension proposals tabled by the Union. It acknowledged the Union's argument that pensions and superannuation are distinguishable and thus not excluded by section 18(1). It then stated, at pp.17-18, that the distinction was one without a difference:

> ... **The Union submits that pensions and superannuation are distinguishable. Based on the argument we perceive the distinction to be one that is without a difference.** A pension is a periodic payment made by a government or employer in consideration of past service and we are unable to conclude that it differs from the superannuation allowance referred to in **The Public Service Superannuation Act,** R.S.O. 1980, c.419. Indeed the union's proposal in Article 7(b) which permits "...an employer to back pension credits at any time on the basis of **superannuation** benefits service obtained with a previous public service employer" suggests that its concept of pension and superannuation and the application of those concepts are interchangeable. The proposal is therefore disallowed.

In **T/19/84,** decision dated October 4, 1984, the Tribunal similarly rejected a union proposal respecting pensions. At pp.12-13, it stated:

> The union has proposed a joint approach by the employer and the union to make the superannuation plan negotiable. Superannuation under article 18 1(b) is one of those matters that is "subject to review by the employer with the bargaining agent" but it is not to "be the subject of collective bargaining nor come within the jurisdiction of the board". While the proposal is harmless on its face, the act is quite clear- superannuation cannot be the subject of collective bargaining at all and it is "not within the jurisdiction of a board" which in our view includes a board of arbitration.
>
> If the employer refuses to review the governing principles of superannuation with the union, then the union has other remedies - but those remedies are not to be in a collective agreement. The act is clear and the proposal is disallowed.

The Tribunal's conclusion respecting the interchangeability of concepts of pension and superannuation is reflected as well in both the British Columbia Supreme Court decision in **Re British Columbia Hydro and Power Authority and Office & Technical Employees Union, Local 378** (1976), 73 D.L.R. (3d) 103 B.C.S.C. and the Court of Appeal review of that decision in (1977), 77 D.L.R. (3d) 283.

Based on the foregoing, the Tribunal is compelled to find that the Union's proposals on pensions are excluded from the scope of collective bargaining under section 7 of **C.E.C.B.A.** by the clear wording of s.18(1) and the Employer's exclusive entitlement to determine superannuation. The Tribunal cannot accept the Union's submission that the nature and thrust of the pension provisions concern rates of pay, although it may touch on this area.

H. UNCLASSIFIED STAFF:

The Union proposal is as follows:

3. Article 3, Unclassified Staff

Amend Article 3.18 to read:

[A] "The probationary period for a seasonal employee shall be two (2) periods of seasonal employment of at least eight (8) weeks each worked in consecutive years in the same or similar position."

[B] Amend Article 3.35 as follows:

"The following articles shall also apply to seasonal employees: Articles 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 20, 22, 23, and 24 - to be applied among seasonal employees separately from classified employees- 26, 27, 28, 29, 30, 31, 32, 33, 34, 36, 37, 38, 41, 42, 46, 50, 53, 54, 55, 56, and 85.

[C] The parties agree that it is not their intention that seasonal status be used to hire full-time employees. It is therefore agreed that where a seasonal employee is used for a period of full-time employment of nine (9) months the employer will declare such a position to be a full-time, civil servant position and will fill it in accordance with the provisions of the collective agreement, except that the incumbent shall be entitled to apply for the position".

Under Paragraph A, the Union seeks to establish the probationary period for seasonal employees who fall under the unclassified staff. Relevant provisions of the **Public Service Act** are as follows:

6. (1) **When a vacancy exists in the classified service,** the deputy minister of the ministry in which the vacancy exists shall nominate in writing from the list of eligibles of the commission a person to fill the vacancy.

(2) **The Commission shall appoint** the person nominated under subsection (1) to a position on the **probationary staff of the classified service for not more than one year at a time.**

7. The Commission shall, if requested in writing by the deputy minister, recommend to the Lieutenant Governor in Council the appointment of a person on

the probationary staff of the classified service to the regular staff of the classified service, and the recommendation shall be accompanied by the certificate of qualification and assignment of the Commission.

8. (1) A minister or any public servant who is designated in writing for the purpose by him **may appoint for a period of not more than one year on the first appointment for any period on any subsequent appointment** a person to a position in the unclassified service in any Ministry over which he presides.

(2) Any appointment made by a designee under subsection (1) shall be deemed to have been made by his minister.

The Employer maintains that the Union's proposal offends the statutory power given the Minister under section 8(1) of the **Public Service Act.** That section gives the Minister the discretion to appoint a person to the unclassified staff for a period of not more than one year on a first appointment and for any period on any subsequent appointment.

In **T/32/81,** decision dated May 17, 1982, the Union proposal sought to change the probationary period for the classified staff from one year to three months. Section 6(2) of the **Public Service Act** stipulated that the Commission shall appoint on the probationary staff of the classified service, for not more than one year at a time, a person nominated to fill a vacancy in the classified staff.

The union argued that its proposal did not interfere with the Employer's discretion to impose a probationary period but merely limited the duration of the period. The Tribunal found, however, that the discretion extended to both the

appointment and duration of the appointment and that the proposal encroached upon the employer's right to determine appointments. At pp. 13-14, the Tribunal said:

> In our view the discretion of the Commission extends to both the appointment and the duration of the appointment. The Civil Service has an extensive variety of positions and occupations requiring many different skills and qualifications. The opportunity to consider potentially permanent employees in these different jobs is an important feature of the employer's discretion. The legislature has provided the employer with a period of not more than one year to consider these potentially permanent employees. Also under Section 18 (a) the employer has the right to determine "employment" as well as appointment.
>
> Clearly, then the proposal by the union encroaches upon the right to determine appointment. The intention of the legislature, in our view, after reading the relevant legislation is to give the employer the right to hire or employ and that right may be exercised after the employer has considered the on-the-job performance of the probationary employee. Since the employer is given a clear discretion by the legislature in determining the probationary period for up to one year it is our view that the nature and thrust of the proposal submitted by the union fetters that discretion and interferes with the employer's right to make an assessment of potentially permanent employees for periods it deems advisable. That power or right is given to the Commission to exercise on a case-by-case basis and cannot be delegated to arbitration for determination. See e.g. **Durham Police Bd and Police Association,** 1980 28 OR 2d 1 at p.5 (per McKinnon A.C.J.O.)

Under section 18(1), the Employer is given the exclusive right to determine employment and appointment. The probationary period is directly related to these areas and does not at the same time fall directly within the bargaining areas enumerated in section 7. Accordingly, the proposal in **Paragraph A** is disallowed.

The proposal in **Paragraph C** stipulates an agreement that where a seasonal employee is used for a period of full-time employment for nine months, the employer

will declare the position to be a full-time civil servant position and fill it in accordance with the collective agreement, with the incumbent permitted to apply.

The Employer objects to this proposal on the ground that it seeks to determine the conditions under which seasonal employees may become civil servants. The Union, on the other hand, submits that the thrust of the proposal is to establish when a vacancy is created which would then trigger the posting provisions of the collective agreement.

The proposal is not directed to determining when seasonal employees will become civil servants. The proposal is limited to permitting the seasonal employee to apply for the position; it does not guarantee or stipulate that he or she will obtain it. It does not set the conditions under which seasonal employees will become civil servants. The thrust of the proposal is to establish when a vacancy exists. It does not regulate the appointment which will be made to fill the vacancy, although it touches upon the appointment. Accordingly, the proposal is allowed.

I. CASUAL EMPLOYEE:

The union proposal is as follows:

Casual - Other than Seasonal

A Casual employee (other than Seasonal) is defined as a person who works full-time hours for relief or emergency purposes for a period of time not to exceed twenty (20) working days. It is agreed that such employees shall receive the benefits of Article 3 of the Working Conditions agreement.

If at the end of the twenty-day (20-day) period of full days of employment the employer finds that there if (sic) further work to be done by such an employee, either in that casual position or another casual position, the employee may continue to work as a Casual for a further twenty (20) day period of full-time employment.

If at the end of the second period of twenty (20) days of full-time continuous employment the employer wishes to retain the employee, the employee shall be converted to Long-term Temporary status which shall entitle him to all benefits of the collective agreement, retroactive to his original date of hire, except for the provisions of Article 24. Article 24 shall apply as between other Long-term Temporary Employees and shall be geographically limited to within 40 kilometres of the employees' work headquarters.

An employee may remain on a Long-term Temporary position for a further period of four (4) months. If work is to continue for this employee in either the position he occupies or in another position he shall have the right of first refusal to continuing employment. If he declines, the position shall be posted and filled in accordance with the Working Conditions agreement. The employer further agrees that it will not release casual employees and fill the position with another casual employee.

Where a Long-term Temporary employee completes the six (6) month period of employment set out above and the employer wishes to continue with his service either in the position he occupies or in another position, the resulting full-time vacancy shall be posted and filled in accordance with Article 4, except that the incumbent shall be entitled to apply for the position.

In order to endure that these status changes are being appropriately made, the employer agrees to provide the union with the following information: Name of casual employee, position occupied, SIN number of employee, date of hire as a casual, date of renewal of casual employment, date of change to Long-term Temporary status, date of change to Full-time Civil Servant status. Where an employee does not progress to a further period of casual employment or to Long-term Temporary status or to Full-time status, the employer will advise the union of the date of termination and the employee's employee category as of that date."

The Employer does not object to the proposal as it relates to the provision of certain benefits to casual employees.

The Employer objects to the proposal to the extent that it seeks to govern the length of employment of the casual employee, the continuation of that employment and

the status of the employee at the conclusion of that period of employment. It argues that the proposal offends the provision of the **Public Service Act** because the length of employment and subsequent appointment is vested in the Ministry under section 8(1) of the **Public Services Act.**

The Union, on the other hand, argues that the subsequent appointments constitute re-appointments within the meaning of section 7 of **C.E.C.B.A.** and are thus within the scope of collective bargaining.

In **T/32/81**, decision dated November 15, 1983, the Tribunal stated the following at pp. 2-3:

> Section 7 of **The Crown Employees Collective Bargaining Act** gives the union the authority to bargain about "layoffs or re-appointments" of employees. Section 18 gives the employer ... "the right to determine. ... appointment." Thus, under **The Crown Employees Collective Bargaining Act** there does not appear to be any inconsistency -- the employer may determine appointments and the union may bargain about reappointments without interfering with the employer's exclusive function.
>
> Section 8(1) of the **Public Service Act** gives a Minister of his/her designee the power to appoint a person to the unclassified service for a period of not more than one year. That provision appears to us to be an extension or example of the employer's authority under section 18 of **The Crown Employees Collective Bargaining Act** and need not create any bargaining difficulties between the employer and the union.
>
> However, section 8(1) of the **Public Service Act** gives the Minister the power to appoint a person to the unclassified service "for any period on any subsequent appointment." Thus an issue arises as to whether the union's authorization to bargain about reappointment conflicts with the Minister's authority to make subsequent appointments.
>
> In our view, it would be drawing too fine a linguistic line to suggest that there is a distinction between a reappointment and a subsequent appointment. But in any event, we do not think that there need be a conflict between the Minister's right to

make a subsequent appointment and the union's authority to bargain about reappointments.

The Tribunal finds that the proposal falls within the scope of collective bargaining in that, and to the extent that, it is directed to re-appointments and the creation of a vacancy.

J. SUMMARY:

1. **PRIVATIZATION/CONTRACTING OUT:**
   a. Union/management Privatization Review Committee proposal: **allowed;**
   b. Contracting out prohibition: **disallowed.**

2. **TECHNOLOGICAL CHANGE:**
   a. Electronic monitoring proposal: **allowed;**
   b. Notice of introduction of equipment proposal: **allowed.**

3. **OVERTIME:**
   Proposal **allowed.**

4. **SECOND LANGUAGE TRAINING:**
   Proposal **disallowed.**

5. **INSURED BENEFIT PLANS:**
   a. Proposal to cover current retirees **disallowed;**
   b. Proposal to cover retirement benefits for current employees: **allowed and not contested by Employer.**

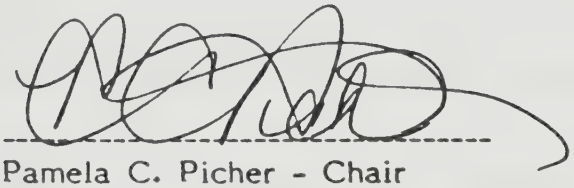
6. **POSTING AND FILLING VACANCIES:**
   Proposal **allowed.**

7. **PENSIONS:**
   a. Estoppel: no estoppel established;
   b. Proposal **disallowed.**

8. **UNCLASSIFIED STAFF:**
   a. Probationary period for seasonal employees: **disallowed;**
   b. Vacancy after 9 months proposal: **allowed.**

9. **CASUALS:**
   a. Proposal **allowed.**

DATED at Toronto this 21st day of July, 1989.



Pamela C. Picher - Chair

I dissent in part

"E.C. Witthames"

Member

I dissent in part

"J.A. Coups"

Member

PARTIAL DISSENT OF EMPLOYEE MEMBER, E.C. WITTHAMES:

Having had an opportunity to read and discuss the Chair's award regarding T/37/88 and recognizing the rather unique design of the CECBA with its built in Management Rights Clause at Section 18, it brings home the truth of a statement by Owen Shime (the then chairman of the Tribunal) in a decision T/32/81:-

> "While there are issues that fall clearly within either Section 7 or 18, it is readily apparent from the proceedings in this matter that many issues are capable of being interpreted as falling under both Sections. The dilemma facing the Tribunal is to determine under which heading a particular proposal falls."

That quotation by Owen Shime is where the Tribunal finds itself in the issues that are referred to it by the Union as falling within Section 7, or at least their right to bargain, and by the Employer who claims that Section 18 of the Act excludes them from bargaining and is an offence to Management's Rights.

But before moving to those issues that cause this dissent, it is necessary to state this member's views with the Union's complaint that the Employer has breached its obligation under Section 8(2) of the Act to bargain in good faith.

DUTY TO BARGAIN IN GOOD FAITH:

The CECBA at Section 8(2) states as follows:-

> "The parties shall meet within fifteen days from the giving of the notice or within such further period as the parties agree upon and they shall bargain in good faith and make every reasonable effort to make a Collective Agreement, R.S.O. 1980 c.108, s.8."

It appears the parties have over the years developed a ritual of exchanging proposals and then at some point they follow protocol and answer questions ....i.e. on behalf of the party proposing the questions - if they had any furhter proposals to table. In response, the party being asked would signify "yes" or "no" and then it too would pose the same questions requiring a "yes" or "no" answer. In reality this whole scenario makes sense, with the added obvious benefit that it put the parties into a posture of knowing what is in dispute and can therefore guide both parties to offer solutions of settlements.

The Chief Negotiators on both sides were skilled and certainly no strangers to each other.

The bad faith bargaining claim arises when the Employer put forward a new proposal on "Sick Leave Benefits" that can best be described as a deletion from existing benefits. See O.L.R.B. July, 1980, 0217-80-U, Local 1979 Retail Clerks International Union Affiliated with the C.L.C., Applicant v. Wilson Automotive (Belleville) Ltd., Respondent, Page 145, para 10.

> "A natural suspicion attaches to the motives of an employer who alters his bargaining position at a critical stage in negotiations....."

The critical stage in the negotiations was set to commence based on the proposals as submitted. The Employer then decided to insert an additional new proposal. While the Tribunal should and does exercise restraint in intervening in the negotiating process, we are, in this member's opinion, obliged to consider such an insensitive act by the Employer as an exploration - was it tailor-made for rejection, or was it real?

Mr. Itenson who testified for the Employer claimed he did not expect the Union to accept the first counter proposal, but this was not a counter proposal, in the true sense, it was a new proposal. When an Employer is on the "take away path" it should not present it camouflaged as a counter proposal. A take away proposal comes to light at the beginning of the bargaining process. The Chair has suggested that "the Employer's disputed proposal would not have been advanced at all had the Union not first requested increased and expanded Sick Leave Benefits." The vast majority of Union proposals are for increases in some form. Counter proposals are mainly a delineation of the original proposal.

This alteration by the Employer, for whatever reason, caused havoc to the Union's position in the bargaining process. In any event, there was a new proposal and the Tribunal should draw the appropriate inferences and award the declaration requested by the Union.

Turning now to those proposals that fall within the scope of Collective Bargaining under Section 7 of the CECBA, and dealing only with:-

Contracting Out
Second Language Compensation
Insured Benefits (Retirees)
Pensions

CONTRACTING OUT:

Contracting out is a way the Employer can circumvent the provisions of the CECBA which grants collective bargaining to the Employees of the Crown. There is a conflict between Sections 7 and 18 with the bargaining rights being trampled on by the Employer using his in-house Management's Rights Clause. [Section 18, subsection 1]. This member submits the first thing that has to be guaranteed is the representation rights of the employees and that's exactly what the Union was doing when it put forward its proposal, "contracting out". For these reasons, it should be allowed as a bargaining issue.

SECOND LANGUAGE COMPENSATION:

The Tribunal has dealt with this matter before in T/001/85 at Page 6 and allowed a proposal that dealt with training where new methods of operations had been brought in. The language issue and the sign language issue could conceivably be additional assets that are needed to perform the job functions. The first paragraph of the Union's proposal is a payment in kind for use of any additional qualifications in the conduct of their every day job operation proposing a bargaining figure of ten percent (10%). Obviously, they are looking for a premium payment for performing additional functions. Section 7 defines, among other items, the bargaining authority as follows:- "other premium allowance for work performed." The Tribunal could have acknowledged that the premium payment is negotiable where there is a change in employment requiring additional responsibility in the form of a second language.

INSURED BENEFIT PLANS
(RETIREES)

This matter had been dealt with by Owen Shime when he was Chairman of the Tribunal and dealt with in T/32/81. The Union submits that this decision handed down by Mr. Shime is, in fact, incorrect. They further claim that there is no specific language in Section 18 of the CECBA that would explicitly preclude bargaining for future and present retirees.

This member supports the opinion as stated in Ms. McIntyre's dissent to T/32/81, especially when she compares the right to representation as found in CECBA Act and the Labour Relations Act. The operative parts of Section 4(2) states:-

[CECBA]

"The Tribunal shall grant representation rights to the employee organization as the bargaining agent of the employees in the bargaining unit".

"I find no material difference in the effect of this language from that found in Section 7(3) of the Labour Relations Act wherein it is stated that:-

[OLRA]

The Board shall certify the trade union as the bargaining agent of the employees of the bargaining unit."

The Employer, in his submission stated:- "It is entirely proper for the Union to negotiate on behalf of present members in the bargaining unit, and in fact, to negotiate retirement benefits for those who are currently members of the bargaining unit. However, it is not appropriate for the Union to attempt to negotiate benefits on behalf of those who have already retired."

That is, an "opinion" of the Employer and not a fact under the Act. If the Tribunal is going to determine matters that are or are not negotiable based on the Act, then in this case, the Tribunal is not faced with Section 18 standing in its way. We must turn to the whole purpose of representation. Present and future retirees only have their Union as their bargaining agent.

In the Liquor Board of Ontario and the Ontario Liquor Board Employees Union (1980) case, the Divisional Court specifically considered the issue of whether or not the parties may negotiate the insurance benefits for retirees within the phrase "a term and condition of employment". The Court held, among other reasons, that the Act should be interpreted liberally given that the legislators had taken away the right to freely bargain collectively.

This member takes the position that "terms and conditions of employment" take in a whole basket of items, including what the employee is entitled to on retirement. The right to bargain for those retirement benefits for present retirees would, in this member's opinion, be a negotiable item.

PENSIONS:

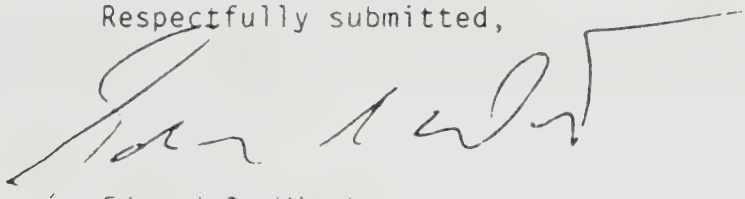
This question deals with "superannuation" versus "Pensnion benefits" as a term and condition of employment. Mr. Shime in T/32/81 stated at Page 27:-

> "Bargaining generally, contemplates a total wage package and the allocation of part of the wage package to different benefits for current employees is perfectly permissible."

There is no doubt in this member's mind that pensions are an integral part of the gainable benefits through collective bargaining, and as such, must be matters which the parties negotiate and share in the administration of such plan. A Pension Plan is a "trust" and must always be managed in the best interests of the participants. The fact that the investment returns from a pension plan should be used for the benefits of the plan's participants, has been, in recent years, given considerable publicity and support when employer's try to remove earnings from the fund. The Courts, in recent decisions, are more favorable than the government's introduction of proposed legislation especially in the area of a "pension plan surplus". The Ontario Court of Appeal recently ordered Ontario Hydro to repay 400 million dollars to its pension fund taken by Hydro as a "Contribution Holiday".

This member, (as stated in a previous dissent), acknowledged the word "superannuation" in Section 18, as being an excluded matter. That does not waive my thinking on the negotiated benefits and earned interest being applied in the form of Pensions and Pension improvements. Therefore, this member would allow this request as bargainable.

Respectfully submitted,



Edward C. Witthames
(Member)

July 21, 1989

PARTIAL DISSENT OF EMPLOYER MEMBER, J.A. COUPS:

I am generally in agreement with the Award. I must, however, dissent in three areas:

(1) **Technological Change**

Paragraph (b) deals solely with the subject of supervision. The question of health and safety is not disputed by management and falls within the scope of paragraph (a). The content of paragraph (b) has been dealt with by previous Tribunals and has been disallowed. I would have maintained this position.

Paragraph (c) has the potential of banning the introduction of technology. The impact one year hence is obviously at best a calculated guess. In my opinion, the weight of the proposal falls within the scope of work methods, procedures and equipment and thus should be disallowed.

(2) **Unclassified Staff**

The Union submissions on Unclassified Staff should be disallowed in their entirety because of the Public

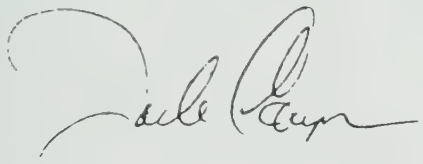
Service Act. In effect, by allowing paragraph (c) we are infringing upon the authority vested within the legislation and this is not correct. This is supported by the decision of Tribunal T/32/81.

In my opinion, a vacancy, albeit seasonal, does exist. The potential is hereby created by allowing seasonal positions to ease into permanent positions. This is contrary to the Public Service Act and accordingly should be disallowed.

(3) **Casual Employees**

Again, I disagree with the Chairman and would disallow the Union's proposal on the basis it is contrary to the Public Service Act.

Respectfully submitted,



J. A. Coups

July 21, 1989

T/0047/88-1

Ontario Public Service
Labour Relations Tribunal

Fonction publique de l'Ontario
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T/0047/88

CROWN EMPLOYEES COLLECTIVE BARGAINING ACT, R.S.O. 1980, C.108

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

Between

COMPLAINANT: OPSEU (Klassen)

- and -

RESPONDENT: The Crown in Right of Ontario
(Ministry of Education)

BEFORE:

D. Stanley	Vice-Chairperson
M. Sullivan	Member
J. Coups	Member

FOR THE APPLICANT:
N. Roland
Counsel
Cornish Roland
Barristers & Solicitors

FOR THE RESPONDENT:
D. Costen
Counsel
Human Resources Secretariat
Management Board of Cabinet

HEARING: September 28, 1990

This complaint is brought under s. 32 of the *Crown Employees Collective Bargaining Act*, R.S.O. 1980, c. 108 (hereinafter referred to as CECBA). The Complainant, Ontario Public Service Employees Union (hereinafter referred to as OPSEU) alleges that the employer, the Crown, represented by the Ministry of Education, Ross MacDonald School for the Visually Impaired, has violated s. 29 (2) (a) and (c) of the Act. Those sections read as follows:

> 29. - (2) The employer or any person acting on behalf of the employer shall not,
> (a) refuse to employ or to continue to employ or discriminate against a person with regard to employment or any term or condition of employment because the person is exercising any right under this Act or is not a member of an employee organization;
> (c) seek by intimidation, by threat of dismissal or by any other kind of threat or by the imposition of a pecuniary or any other penalty or by any other means to compel an employee to become or refrain from becoming or to continue or cease to be a member of an employee organization, or to refrain from exercising any other right under this Act; or

There is a fifty (50) paragraph statement outlining the allegations attached as an Appendix to the application. They relate to alleged violations of the above sections in relation to the employment of Iona Klassen, who at the time of the complaint was employed as a braillist at the Ross MacDonald School for the Visually Impaired.

At the opening of the hearing counsel for the employer raised a preliminary matter. First he asked that the complaint be dismissed for delay. Second, that we ought to dismiss that part of the complaint which ought to be before the Human Rights Commission.

DELAY ISSUE

The complaint alleges that Ms. Klassen was discriminated against as a result of her having exercised her right under the Act to file grievances. The factual determination we have to make is whether she was discriminated against, and whether that was because of her filing grievances. There were four grievances filed by Ms. Klassen; the first was a classification grievance filed in 1983; second, a grievance filed in 1986 concerning a job competition; third, a grievance alleging discrimination on the basis of a physical handicap filed in April1987; and fourth, an October 1988 grievance alleging the employer was endangering her heath and safety.

Counsel for the employer argues that, since the Grievance Settlement Board found they had no jurisdiction to deal with the 1987 discrimination grievance, no legitimate rights under the Act were involved and the grievance could not be the basis of a conclusion the

employer was discriminating against her for exercising rights under the Act. Council submits that the fourth grievance was filed after the employer actions alleged to violate s. 29. Consequently this grievance must be disregarded. That leaves two grievances predating 1986, the union's case then, is that she is being discriminated against because of the grievances she filed in 1986 and 1983.

Counsel argued that we had the right to dismiss an application for delay and that we ought to exercise that right in this case. We were referred to decisions of the OLRB, *SHELLER GLOBE OF CANADA LTD.*, DECISION # 1621-81-U, and *THE CORPORATION OF THE CITY OF MISSISSAUGA*, DECISION # 1927-81-U.

Counsel noted that it was three and six years between the grievances and the filing if this complaint, and that the documents referred to go back to 1981. Counsel noted the difficulty of recreating conversations that far back and argued that the union bears an onus of explaining why the complaint was not made earlier.

Counsel for the complainant argued that the discrimination against the grievor is a continuing fact, that it is as a reprisal for having filed these four grievances, and that we must look at the circumstances of each of these cases. The grievor was away from work for extended periods of time, she has been on LTD but after two years must pass a higher threshold to qualify. She now contends she is able to return provided the employer makes reasonable accommodation for her and the employer's continuing refusal to do that adds urgency to her case.

Counsel referred us to two Tribunal decisions and a GSB decision on the issue of delay. The complaint of *AKBAR MAGHSOUDI*, (1988), FILE # T/0060/87, was heard by this Tribunal and the issue of delay dealt with, the Sheller Globe decision of the OLRB was considered. In the Maghsoudi case the complaint cited alleged acts of discrimination that had taken place many years in the past. A year passed between the last discriminatory act complained of and the filing of the complaint. The Tribunal dismissed the complaint referring to a very "lengthy delay" with no explanation. Counsel for the complainant argues our case is distinguished from the Maghsoudi case on the basis of the alleged "continuing discrimination" as opposed to isolated incidents in the past.

Counsel submits that the Tribunal in *WAGGONER*, (1986), FILE # T/0003/86, said that the employer would have to establish prejudice to support an application to dismiss on the grounds of delay. (see page 15). We were also referred to the decision of Vice Chairman Roberts, GSB in the *OPSEU, REDMOND and MINISTRY OF HEALTH*, (1989), FILE # 0928/88, where the nature of a "continuing grievance" is discussed, and where the Chairman held that time limits were not applicable in the instance of a continuing grievance. Counsel maintains that Ms. Klassen's complaint against the employer is of a continuing nature.

RULING

For the purpose of this application we can not disregard the grievance filed in 1987 which was dismissed for want of jurisdiction. The employer is not free to retaliate against an employee who files a

grievance which is dismissed any more than they are free to retaliate against an employee who succeeds on a grievance. The intent of s. 29 is to assure employees that they are free from retaliation when they exercise rights under the Act. So long as it is not found to be an abuse of the process, the taking of any grievance, even those ultimately found to be beyond the jurisdiction of the GSB, is protected by s. 29.

It is clear that any factor alleged to have been a motive for prohibited conduct under s. 29, must have taken place prior to the conduct complained of.

This is not a situation like that in *SHELLER GLOBE, CITY OF MISSISSAUGA,* and *MAGHSOUDI,* where an alleged act of discrimination takes place and a long time passes before a complaint is made. Here the act complained of is the employer's refusal to give the grievor her job back, allegedly because the complainant filed grievances in the past. There is no doubt that the complainant has a difficult task of establishing the requisite cause and effect relationship of events separated by long periods of time. However this is not a case where delay is an issue. We therefor dismiss the employer's objection.

MOTION TO DISMISS PART OF THE COMPLAINT

Counsel for the employer argued that if we proceeded to hear the complaint we ought to at least strike out that portion of the complaint which is based on allegations identical to those made in a complaint under the *Human Rights Code.* A copy of a complaint to the Human Rights

Commission, signed by Ms. Klassen, and dated November 28, 1988, was filed with the Tribunal as Exhibit #3. That complaint alleges a failure on the part of the employer to accommodate Ms. Klassen's visual and physical handicap. Counsel argues that the complaint before this Tribunal alleges the same employer failure to be a discriminatory practice prohibited by CECBA. Counsel points out that the same remedy is sought in both forums. He argues that this Tribunal can only deal with the issue of whether Ms. Klassen has been penalized for exercising rights under CECBA, and not the issue of whether the employer is obliged to make accommodation for her disability. We were advised that Ms. Klassen's Human Rights Complaint is still in the investigatory stage by the Commission.

Counsel cited the GSB decision of Vice Chairman Gandz, *OPSEU, AUBIN and MINISTRY OF CORRECTIONAL SERVICES*, 1987, #1044/85, as authority for the proposition that the Tribunal has no jurisdiction to enforce the provisions of the Human Rights Code, and a second case *OPSEU, BEINTNER and MINISTRY OF TRANSPORTATION,* 1988, #1841/87, where Vice Chairman Roberts said at page 16 that matters which were in pith and substance positive obligations under a comprehensive scheme which provides it's own mechanism for the investigation and adjudication of complaints ought not to be enforced through grievance arbitration.

Counsel for the complainant submits that this objection goes to the question of remedy not the merits of the claim, which is that the complainant Ms. Klassen has had actions taken against her by the employer because she used sick leave and because she filed several grievances. These actions give rise to a remedy under the Collective Agreement,

under CECBA, and under the *Human Rights Code*. Counsel submits that in this case it is the employer's motive that is important and that just because the employer's choice of weapons against her amounts to a violation of the *Human Rights Code,* does not mean the Tribunal has no jurisdiction to enquire into the employer's motive for the actions.

Counsel for the complainant referred us to *McLEOD v EGAN* (1974), 46 DLR (3d) 150, (S.C.C.), which stands for the proposition that an Administrative Tribunal can apply the terms of Statutes which are not within the realm of their exclusive jurisdiction.

RULING

We conclude this is not an issue which should be dealt with in a preliminary fashion. We are not prepared to strike out any part of this complaint on the basis of a complaint arising out of the same facts being filed under the Human Rights Code. The parties are free to argue the appropriateness of the remedies sought at the conclusion of the hearing.

DATED THIS 21st DAY OF OCTOBER 1990

Douglas C. Stanley, Vice Chair

Michael Sullivan, Member

Jack Coups, Member

Ontario Public Service
Labour Relations Tribunal

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T/0047/88-2

T/0047/88

IN THE MATTER OF A COMPLAINT

Under

THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

Before

THE LABOUR RELATIONS TRIBUNAL

Between:

OPSEU (Klassen)

Complainant

- and -

The Crown in Right of Ontario
(Ministry of Education)

Respondent

BEFORE:	D. Stanley	Vice-Chairperson
	M. Sullivan	Member
	J. Coups	Member

FOR THE COMPLAINANT:	N. Roland Counsel Nelson Roland Barristers & Solicitors
FOR THE RESPONDENT:	D. Costen Counsel Human Resources Secretariat Management Board of Cabinet
HEARING:	September 28, 1990 February 7, 1992 November 13, 1992

This complaint is brought under s. 32 of the *Crown Employees Collective Bargaining Act*, R.S.O. 1980, c. 108 (hereinafter referred to as CECBA). The Complainant, Ontario Public Service Employees Union (hereinafter referred to as OPSEU) alleges that the employer, the Crown, represented by the Ministry of Education, Ross MacDonald School for the Visually Impaired, has violated s. 29 (2) (a) and (c) of the Act. Those sections read as follows:

> 29. - (2) The employer or any person acting on behalf of the employer shall not,
>
> (a) refuse to employ or to continue to employ or discriminate against a person with regard to employment or any term or condition of employment because the person is exercising any right under this Act or is not a member of an employee organization;
>
> (c) seek by intimidation, by threat of dismissal or by any other kind of threat or by the imposition of a pecuniary or any other penalty or by any other means to compel an employee to become or refrain from becoming or to continue or cease to be a member of an employee organization, or to refrain from exercising any other right under this Act; or

There is a forty-nine (49) paragraph statement outlining the allegations attached as an Appendix to the Complaint. They relate to alleged violations of the above sections in relation to the employment of Iona Klassen, who at the time of the complaint was employed as a braillist at the Ross MacDonald School for the Visually Impaired. The relief sought from this Tribunal is as follows:

50. Accordingly, the Complainant seeks the following relief:

(a) A declaration that the Respondents unlawfully refused to employ the Grievor, discriminated against her, disciplined her and intimidated her because of her attempts to exercise her rights under the collective agreement and the Act.

(b) An order that the Respondents take all necessary and reasonable steps to accommodate the Grievor's disabilities which shall include but not be limited to the following:

(i) return the Grievor to her prior job as a Resource Braillist with full compensation for all monies lost since she was required to go off work on November 24, 1987, including interest, and restoration of her full seniority and pension rights and attendance credits.

(ii) provide her with a computer training programme adequate to allow her to perform to the employer's standard on the computer brailling system. With equitable assignment of the production level of the other resource braillists. Such assignments must be compatible with the grievor's disabilities and to make the assignments compatible with the grievor's disabilities.

(iii) ensure proper lighting accommodation in all work areas.

(iv) the order shall ensure proper accommodation of disabilities at the work sites and in job tasks including job rotation in the position of resource braillist as recommended by medical and related reports

(c) An order that the Respondents cease and desist from any further harassments or violations of the Grievor's rights under the

collective agreement and the Act.

(d) Such other relief as may seem just and proper in the circumstances.

At the opening of the hearing on September 28, 1990, Counsel for the Employer raised a preliminary matter. First he asked that the complaint be dismissed for delay. Second, that we ought to dismiss that part of the complaint which ought to be before the Human Rights Commission. Both these preliminary objections were dismissed in a Ruling dated October 21, 1990.

By the time we began hearing the merits of the complaint, on February 7, 1992, Ms. Klassen was back at work. By the time of our second scheduled day of hearings, November 13, 1992, two grievances raised by Ms. Klassen had been heard, and an Award dismissing them, dated August 5, 1992, had been handed down by Arbitrator Samuels.

When our hearing opened on November 13th. Ms. Klassen asked for an adjournment of our proceedings on the basis that she was taking action to try and overturn the Samuels Award on judicial review. Mr. Nelson Roland is the solicitor of record in this case representing OPSEU. He advised the Tribunal that his instructions, from his client — OPSEU, were to proceed with the matter. Counsel for the Employer, Mr. Coston, opposed the request for adjournment from Ms. Klassen.

The Board adjourned briefly to consider the request and denied it giving the following reasons at the hearing:

1. OPSEU is the Applicant in the matter before this Board

2. We have no jurisdiction to review the procedures and conclusions of the Samuels Arbitration Board.

3. We have no jurisdiction over and can not become involved, on this application, in a dispute between OPSEU and one of their members over representation.

4. We have to accept Mr. Roland's statement that he is retained by OPSEU and that they are prepared to proceed.

5. Because both parties are prepared to proceed we deny Ms. Klassen's request for an adjournment.

When we continued Ms. Klassen asked that we note her continued presence was under protest.

Before Mr. Roland could resume his case Mr. Coston advised that he had another motion to strike the proceedings on the basis of delay and on issue estoppel. Counsel for the Employer pointed out that in our earlier Ruling we accepted the argument made by Counsel for OPSEU that Ms. Klassen's grievances were of a continuing nature as they related to the Employer's failure to accommodate her in the work place. Samuels discussed the grievances before him and made three points concerning them, starting at page 4 of his Award he said:

> Firstly, the essential issue before us is whether or not the employer violated Article 18 in some way — did the employer fail to take reasonable measures for the health and safety of the grievor? Determination of this issue may lead us into a consideration of the obligations of the employer under the *Ontario Human Rights Code*.
>
> Secondly, this Board is no longer being asked for an order concerning training or a special assignment for the grievor, because the grievor is now back at work on a satisfactory full-time basis. However, in determining whether there was a violation of Article 18, we may consider whether or not there ought to have been training or a particular assignment at some time before these matters were resolved satisfactorily by the parties.
>
> Thirdly, while the grievance was filed in 1988, and therefore focused on events up to the time of the grievance, in our view we must consider

> the dealings between the parties right up to the point when the parties reached a satisfactory resolution of the grievor's work situation.

The issue that Samuels dealt with, according to counsel, was whether the School made "reasonable accommodation" for Ms. Klassen. This is the issue raised specifically by various paragraphs of the complaint to the Tribunal. Counsel submitted that some of the specific allegations raised in the Complaint are in fact addressed by Samuels. For example the factual matters alleged in paragraphs 19—20 of the Complaint are discussed by Samuels at page 6 of his Award; the allegation in paragraph 28 of the Complaint, that Ms. Klassen was not given sufficient training, is dealt with at page 8 of the Award; and the issues raised in paragraph 43 are dealt with at pages 18—19.

Counsel argued that the very *issue* to be decided by this Tribunal has already been decided by Samuels and that it should not be re-litigated. Counsel argued it was counter to labour relations policy to allow settled matters to be re-litigated and that it is barred by "issue estoppel" as it was enunciated by the OLRB in *Tom Norton and Canadian Union of Operating Engineers* , October 13, 1983 (OLRB Rep. 1633); and *Preston Spring Gardens Retirement Home,* March 26, 1985 (OLRB Rep. Mar. '85, p. 463).

In that latter Ruling the OLRB accepted that they ought to apply the concepts of "res-judicata" and "issue estoppel" in relation to arbitration Awards. The Board then set about defining "issue estoppel" as follows:

> In our view, before issue estoppel can arise with respect to the issues resolved in an earlier determination, those issues must have been a necessary or integral part of that determination. Mr. Justice Dickson, for the majority in the Supreme Court of Canada, described the principle of issue estoppel in this way in *Angle v. Minister of National Revenue,* (1974), 47 D.L.R. (3d) 544 at page 555—556:

> The second species of estoppel *per rem judicatam* is known as "issue estoppel", a phrase coined by Higgins, J., of the High Court of Australia in *Hoysted et al v. Federal Commissioner of Taxation* (1921), 29 C.L.R. 537 at pp 560—1:
>
> I fully recognize the distinction between the doctrine of res judicata where another action is brought for the same cause of action as has been the subject of previous adjudication, and the doctrine of estoppel where, the cause of action being different, some point or issue of fact has already been decided (I may call it "issue estoppel")

Counsel argued that in this Complaint the employer's alleged failure to accommodate Ms. Klassen is being used to support a charge of unfair labour practice. However it has already been decided by Arbitrator Samuels that there was no failure to accommodate Ms. Klassen.

Counsel for OPSEU argued that this is the same argument which was made at the opening of this matter and dismissed by the Tribunal in its earlier Ruling. He maintained that the issue that Samuels was dealing with is no the same issue as that raised by this Application. Counsel submitted that Samuels was dealing with the narrower issue whether Article 18.1 was violated whereas this Application alleges that the Employer was motivated by an anti-union animus, an issue not dealt with by Samuels at all.

Counsel further pointed out that, in those cases where an anti-union animus is alleged, it is not sufficient for the employer to establish an innocent reason for their action. An anti-union animus taints otherwise legitimate motives. Counsel acknowledged that under CECBA he had the onus of establishing an improper motive but argued the finding of an Arbitrator, that the employer had an innocent explanation for their actions, does not settle the issue. Counsel noted that Samuels declined to even make a determination as to whether the Employer violated the *Human Right Code*, and similarly declined from dealing with the alleged violation of CECBA. Counsel asserted that all the evidence they intended on leading would

show an anti-union animus on the part of the employer in their treatment of Ms. Klassen.

Counsel for OPSEU referred us to pages 5—6 of our preliminary Ruling, which dealt with the Employers request to strike out portions of the Complaint as follows:

> Counsel for the employer argued that if we proceeded to hear the complaint we ought to at least strike out that portion of the complaint which is based on allegations identical to those made in a complaint under the *Human Rights Code.* A copy of a complaint to the Human Rights Commission, signed by Ms. Klassen, and dated November 28, 1988, was filed with the Tribunal as Exhibit #3. That complaint alleges a failure on the part of the employer to accommodate Ms. Klassen visual and physical handicap. Counsel argues that the complaint before this Tribunal alleges the same employer failure to be a discriminatory practice prohibited by CECBA. Counsel points out that the same remedy is sought in both forums. He argues that this Tribunal can only deal with the issue of whether Ms. Klassen has been penalized for exercising rights under CECBA, and not the issue of whether the employer is obliged to make accommodation for her disability. We were advised that Ms. Klassen's Human Rights Complaint is still in the investigatory stage by the Commission.
>
> Counsel cited the GSB decision of Vice Chairman Gandz, *OPSEU, AUBIN and MINISTRY OF CORRECTIONAL SERVICES*, 1987, #1044/85, as authority for the proposition that the Tribunal has no jurisdiction to enforce the provisions of the Human Rights Code, and a second case *OPSEU, BEINTNER and MINISTRY OF TRANSPORTATION,* 1988, #1841/87, where Vice Chairman Roberts said at page 16 that matters which were in pith and substance positive obligations under a comprehensive scheme which provides it's own mechanism for the investigation and adjudication of complaints ought not to be enforced through grievance arbitration.
>
> Counsel for the complainant submits that this objection goes to the question of remedy not the merits of the claim, which is that the complainant Ms. Klassen has had actions taken against her by the employer because she used sick leave and because she filed several grievances. These actions give rise to a remedy under the Collective Agreement, under CECBA, and under the *Human Rights Code.* Counsel submits that in this case it is the employer's motive that is important and that just because the employer's choice of weapons against her amounts to a violation of the *Human Rights Code,* does not mean the Tribunal has no jurisdiction to enquire into the employer's motive for the actions.
>
> Counsel for the complainant referred us to *McLEOD v EGAN* (1974), 46 DLR (3d) 150, (S.C.C.), which stands for the proposition that an

Administrative Tribunal can apply the terms of Statutes which are not within the realm of their exclusive jurisdiction.

RULING

We conclude this is not an issue which should be dealt with in a preliminary fashion. We are not prepared to strike out any part of this complaint on the basis of a complaint arising out of the same facts being filed under the Human Rights Code. The parties are free to argue the appropriateness of the remedies sought at the conclusion of the hearing.

Counsel argued that in the *Norton and Operating Engineers* case the issue in the arbitration case was whether the Complainant was discharged for union activity, the very same issue as before the OLRB. That is not the case here where Samuels was not dealing with an allegation of unfair labour practice, he dealt with two grievance; first that the Employer was discriminating against Ms. Klassen because of her handicap; second that the employer was refusing to allow her to do her job on a computerized brailler and was denying her training and practical assignments which would bring her to a particular standard of proficiency on that equipment. There was no allegation in the grievances that the Employer was motivated by an anti-union animus.

Counsel for OPSEU referred us to the OLRB policy on deferral to arbitration Boards, as set out in *Valdi Inc.* [1980] OLRB Rep. Aug. 1254 where the Board said at pages 1258—59:

> It may be that the Board's approach has been somewhat less refined but the American treatment of deferral issues is not inconsistent with Board jurisprudence. Cases like *Canadian Acme Screw and Gear Ltd.* (1954) 54 CLLC ¶ 17,083; *John Inglis Co Ltd* (1953), 53 CLLC ¶ 17,049; *National Showcase Ltd.* (1961), 61 CLLC ¶ 16,185; *Heist Industrial services Ltd.* (1963), 63 CLLC ¶ 16,623; *Wallace Barnes Co. Ltd.* (1961), 61 CLLC ¶ 16,198 and *Collingwood Shipyards,* [1967] OLRB Rep. July 376 all approach the deferral doctrine as one that will encourage the practice and procedure of collective bargaining. These cases are also aimed at discouraging dual litigation and forum shopping by encouraging the parties to employ initially the

> contractual procedures for dispute settlement which they have created. See *Kodak Canada Ltd.* [1977] OLRB Rep. Feb. 49. But it is also apparent that in those cases the board acted on the premise that the resolution of the contractual issues was congruent with the resolution of the statutory unfair labour practice issues. See *Imperial Tobacco Products Ont. Ltd.*, [1974] OLRB Rep. July 418 at para. 26. This congruence between the contractual dispute and the overlying unfair labour practice complaint is significant in the sense that the Board is able to take the view that the matter is primarily a contractual or factual difference between the parties. See *Corporation of the County of Middlesex*, [1976] OLRB Rep. Aug 427 at para 4. However, where key provisions of the *Labour Relations Act* require important elaboration and application or where the employer's or trade union's conduct represents a total repudiation of the collective bargaining process, it becomes more difficult to characterize the complaint as essentially contractual. It is these situations that the Board has asserted its jurisdiction. (emphasis added)

Counsel argued that the issues in the Samuels arbitration were not *congruent* with the issues raised by this Complaint and the core issues in the complaint are not contractual. He argued that where it is found to be simply a disguised attempt to enforce the collective agreement through the Labour Board, the Board defers to arbitration, but not if the matter is within the Board's jurisdiction. Counsel pointed out that the Complaint was filed before Samuels decision on the contractual issues, and argued that those are separate and distinct issues from the ones raised in the Complaint. Consequently, he argued, the issue of deferrence is not relevant.

Counsel contended that an earlier Ruling by this Tribunal, differently constituted, in File # T/0017/91, dated October 22, 1992, dealt with a different factual situation and was not applicable.

CONCLUSIONS

First of all this is clearly not the same motion as the one we already ruled on. This motion is based on the factual determinations made in the Arbitration of two grievances filed by Ms. Klassen and released to the parties in August 1992.

In *OPSEU and The Crown in Right of Ontario, Ministry of Natural Resources*, File # t/0017/91, October 22, 1992, we applied the principles of res judicata where a matter had been settled through the grievance process and then resurrected as a Complaint of unfair labour practice under CECBA. We quoted the text *Evidence and Procedure in Canadian Labour Arbitration* (Professor Gorsky) at page 234:

> "If at first you don't succeed, try, try again" may be a worthy maxim, but it does not apply in law. It is a rule of common law that a case should only be tried once. This rule applies to arbitrations as well as to court cases. The rule is based on the easily defensible idea that there should be an end to litigation and that it would be unfair to impose on a party the burden of defending himself two or twenty times over.
>
> There are several ways in which repeated hearings on the same matter are prevented. The first is called "cause of action (*res judicata*) estoppel". An issue before the parties may contain several sub-issues. In a case dealing with a violation of a rule there are several sub-issues: Was the rule posted? Was it reasonable? Did it apply to the grievor? If the larger issue has been decided, either by a board or by an unconditional settlement, withdrawal, or abandonment beforehand, the lesser ones cannot be made the subject of another arbitration. (emphasis added)

A footnote to the above text cites the authority of *Town of Grandview v. Doering,* [1976] 2 S.C.R. 621, where the Supreme Court of Canada adopts a Statement from a much earlier British authority *Henderson v. Henderson* (1843), 3 Hare 100, where Vice-Chancellor Wigram says:

The plea of *res judicata* applies, except in special cases, not only to the point upon which the Court was actually required by the parties to form an opinion and pronounce a judgement, but to every point which properly belonged to the subject of litigation, and which the parties,

> exercising reasonable diligence, might have brought forward at the time. (emphasis added)

The issue in that case arose in a different manner but the sentiments expressed with respect to finality of decided issues between the parties are applicable. We accept the definition of "issue estoppel" found in the *Preston Springs* case cited above. We conclude that the effect is to extend the concept of res judicata to the factual foundation of a cause of action.

The findings of the Samuels Board on the grievances filed by Ms. Klassen are as follows:

> Article 18.1 requires the employer to take reasonable measures for the health and safety of its employees. In our view, the events which we have described demonstrate that the School in this case did everything it could throughout the piece to attempt to accommodate Ms. Klassen and to make it possible for her to function effectively. There is no need for us to say anything about the requirements of the *Ontario Human Rights Code* , or the impact of the Code on the Schools obligations under 18.1 of the collective agreement. The simple fact is that the School always stood ready to accommodate Ms. Klassen, if she would cooperate with the School. Whatever the requirements of the *Code* , the School tried to accommodate Ms. Klassen.
>
> The problem throughout was the lack of adequate medical information provided to the School. The School had to function "in the dark" until the full vocational assessment was done in 1991.
>
> And there was a lack of adequate medical information for two reasons: firstly, virtually all the medical reports the School did receive were obviously flawed because they were based on an understanding of the facts which was incorrect (and, as we have said in this award repeatedly, we find this was due to Ms. Klassen misinforming her doctors and other professionals about what work she was doing at the School during late 1986 and most of 1987); and, secondly, Ms. Klassen refused access to additional medical information or examination which

would have proved helpful to the School in determining what it ought to do to assist her.

It was clear throughout the post-car-accident period, up to 1991, that, in order to make all the necessary accommodations and arrangements for Ms. Klassen, a full vocational assessment with her full cooperation would be necessary. This was apparent because all the School's efforts came to nought. The School gave Ms. Klassen virtually everything she ever requested, and still she suffered eyestrain, headaches, stress and physical pain. By mid-1987, Ms. Klassen thought that the computer was going to be her salvation, but she had enormous difficulty grasping the brailling programs and understanding the level of proficiency which was required of her. And she experienced serious physical problems in the operation of the computer — eye strain, neck, arm and hand pain (virtually none of which was reported by her to her doctors, who kept writing that all would be solved if she would just be allowed to use the computer for brailling). The simple fact is that Ms. Klassen herself had no idea what accommodations would work for her. But instead of devoting her energies to working with the School to find a solution, she chose to fight the School.

The remedy requested by OPSEU in this Complaint is reproduced at page 2 above, it must be read in light of the conclusions arrived at by Samuels. Although Counsel for OPSEU is absolutely correct when he says there is a distinction between the substance of an unfair labour practice complaint and the substance of a grievance alleging breach of the collective agreement, it is clear from the remedy sought in this case that the complaint is brought in furtherance of a contractual dispute — a dispute over rights under the collective agreement which Ms. Klassen says are being denied her. In the last sentence of the OLRB discussion on deferral to Arbitration, as quoted above from the *Valdi* case the Board says:

However, where key provisions of the *Labour Relations Act* require important elaboration and application or where the employer's or trade union's conduct represents a total repudiation of the collective bargaining process, it becomes more difficult to characterize the complaint as essentially contractual. It is these situations that the Board has asserted its jurisdiction.

There is no critical issue regarding the interpretation of CECBA being asserted by OPSEU in this case. Neither can it be said that the employer's actions represent a "total repudiation of the collective bargaining process". The complaint and the remedy sought relate in a very narrow way to Ms. Klassen. Nothing in the complaint or remedy raises broad overriding collective bargaining issues, such that we should simply set aside the findings of the Samuels Arbitration Board and embark on an enquiry as to whether the same facts he adjudicated on disclose an unfair labour practice.

Put very simply what we have in the grievances is an allegation by Ms. Klassen that the employer has discriminated against her because of a physical handicap, and that they denied her certain training opportunities. Those were the factual issues that were adjudicated on by Samuels, he decided that the employer did not do those things. When Counsel for the Applicant opened his case we were told that because Ms. Klassen filed a grievance and took sick leave the employer took retribution against her — that the employer did various things because it was acting out of anti-union animus. As a remedy OPSEU is seeking the enforcement of Ms. Klassen's contractual rights to accommodation. Arbitrator Samuels has already decided that there was no violation of Ms. Klassen's contractual rights, and that the employer did not take actions to her detriment. We are left with an alleged improper motive for employer actions that Samuels found did not happen. On the basis of Samuel's findings that the employer did not discriminate against Ms. Klassen and did not deny her the opportunity to work and to train on the computer brailler the bargaining agent is now estopped from alleging those actions were the result of an anti-union motivation.

Gorsky says in his text, quoted above, that the law protects a person from having to defend themselves twice. The Employer has already defended itself once

against the charge of denying Ms. Klassen her rights under the collective agreement. Samuels said it simply did not happen. That is the factual underpinning to the Complaint before us, and the Employer ought not to be put to defend itself a second time against the charge that it did that, although in the context of a different cause of action.

For all the above reasons we allow the Employer's motion and dismiss this Complaint.

Dated this 26th day of February 1993

DOUGLAS C. STANLEY VICE- CHAIR

JACK COUPS, MEMBER

MICHAEL SULLIVAN, MEMBER

Ontario Public Service Labour Relations Tribunal
Fonction Publique de l'Ontario Tribunal Administratif des Relations du Travail

180 Dundas Street West, Suite 2100, Toronto, Ontario M5G 1Z8

416/598-0688

T/0049/88

Crown Employees Collective Bargaining Act
R.S.O. 1980, c. 180

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

Between: Verna Karst

Applicant

- and -

Ontario Public Service Employees Union

Respondent
Employee
Organization

- and -

The Crown in Right of Ontario
(Ministry of Health)

Respondent
Employer

Before: J.H. Devlin, Vice-Chairman
William Walsh, Member
William J. Madigan, Member

For the Applicant: David B. Thomas
Barrister & Solicitor

For the Respondent
Employee Organization: David Bloom
Barrister & Solicitor
Cavalluzzo, Hayes & Lennon

Hearing: June 26, 1989

DECISION

In this application which was filed pursuant to Section 16(2) of the Crown Employees Collective Bargaining Act, Verna Karst seeks exemption from the payment of dues to the Respondent Employee Organization because of her religious convictions.

Mrs. Karst began her employment with the Ministry of Health on March 6, 1989 and since that time, she has worked as a Registered Nurse at the Whitby Psychiatric Hospital.

Mrs. Karst is a member of the Seventh Day Adventist Church and is actively involved in a variety of Church activities. As a Seventh Day Adventist, Mrs. Karst testified that she believes that she must follow the scriptures and the teachings of God which advocate love and peace rather than strife and conflict. Mrs. Karst testified that she seeks exemption from the payment of dues because the methods of the Union are contradictory to the teachings of God and, in particular, the Union engages in confrontation and conflict in order to achieve its goals. Mrs. Karst has not been a member of an employee organization in the past and testified that she cannot financially support an organization in which she does not believe. In the event that the present application were to be denied, Mrs. Karst testified that she would be compelled to resign her employment with the Ministry.

Having heard the evidence of Mrs. Karst, we are satisfied that she is sincere in her religious beliefs and that there exists the necessary nexus between her religious beliefs and her objection to the payment of dues. Accordingly, we order that the provisions of the Collective Agreement pertaining to the payment of dues or contributions to the Respondent Employee Organization do not apply to the Applicant, Verna Karst, and that she shall not be required to pay dues or contributions to the Ontario Public Service Employees' Union. Amounts equivalent to such dues or contributions shall be remitted by the Employer to a charitable organization mutually agreed upon by the Applicant and the Respondent Union. In the event that they are unable to agree, they shall so advise the Tribunal in writing and shall include representations as to the charitable organization to be designated by the Tribunal. The Tribunal retains jurisdiction with respect to this matter.

DATED AT TORONTO, this 17th day of July, 1989.

Vice Chairman

W. Walsh, Member

W. Madigan, Member

Ontario Public Service Labour Relations Tribunal
Fonction Publique de l'Ontario
Tribunal Administratif des Relations du Travail

180 Dundas Street West, Suite 2100, Toronto, Ontario M5G 1Z8

416/598-0688

T/0052/88

CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

APPLICATION FOR REPRESENTATION RIGHTS
BEFORE THE ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

B E T W E E N:

TEXTILE PROCESSORS, SERVICE TRADES, HEALTH CARE, PROFESSIONAL AND TECHNICAL EMPLOYEES INTERNATIONAL UNION, LOCAL UNION 351-A

Applicant

- and -

THE METROPOLITAN TORONTO CONVENTION CENTRE CORPORATION

Respondent

Before:

J.H. Devlin	Vice Chairman
D. Bonazzo	Member
W.J. Madigan	Member

Decision

1. No statement of desire to make representations has been filed with the Tribunal within the time fixed under the Regulations following the taking of a representation vote pursuant to the direction of the Tribunal.

2. The Tribunal finds that the Applicant is an employee organization within the meaning of Section 1(1)(g) of the Crown Employees Collective Bargaining Act.

2. Having regard to the agreement of the parties and in accordance with the Act, the Tribunal finds the following to be the unit of employees appropriate for collective bargaining:

> All employees of the Metropolitan Toronto Convention Centre Corporation employed in the Municipality of Metropolitan Toronto save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, security staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.

3. On the taking of the representation vote, more than 50% of the ballots cast were in favour of the Applicant and accordingly, the Tribunal hereby grants representation rights to the Applicant as the bargaining agent of the employees in the aforesaid bargaining unit.

5. The Registrar will destroy the ballots cast in the representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Tribunal from one of the parties before the expiration of such 30-day period.

DATED at Toronto, Ontario, this 10th day of October, 1989.

Jane H. Devlin - Vice Chairman
for the Tribunal